Office of Attorneys for Children
Appellate Division, Fourth Department

Case Digest 2016

Covers January through December 2016 Decision Lists

ADOPTION

Affirmance of Order Determining Best Interests of Child Promoted by Adoption by Foster Parents

Family Court determined that the best interests of the subject child would be promoted by her adoption by petitioners, the child's foster parents. The Appellate Division affirmed. The contention of respondent, a biological father entitled to notice of the adoption, was rejected that the gaps in the hearing transcript attributable to inaudible portions of the audio recording were so significant as to preclude appellate review. The court's bench decision adequately set forth the grounds for its determination. Moreover, the record was sufficient to permit the Court to make its own findings, and the court's determination that adoption by petitioners was in the child's best interests was supported by a preponderance of the evidence.

Matter of the Adoption of Haly S.W., 141 AD3d 1106 (4th Dept 2016)

Consent of Biological Father Not Required

Family Court determined that respondent was not a father whose consent to the adoption of the subject children was required. The Appellate Division affirmed. Section 111 (1) (d) of the Domestic Relations Law provided that a child born out of wedlock may be adopted without the consent of the child's biological father, unless the father showed that he maintained substantial and continuous or repeated contact with the child, as manifested by: (I) the payment by the father toward the support of the child..., and either (ii) the father's visiting the child at least monthly when physically and financially able to do so..., or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so. Respondent testified that, at the time of the hearing, he had been incarcerated for more than two years and had provided the children with no support during that time. He also testified that he had not communicated with the children for at least seven months prior to the hearing. Respondent was not relieved of his responsibility to provide financial support while he was incarcerated absent a showing of insufficient income or resources. His testimony that he sent letters to the caseworker was contradicted by the testimony of the caseworker. Thus, the court properly determined that respondent was a notice father whose consent was not required for the adoption of the children. Because respondent failed to appeal from the order settling the record, his contention that the court erred in excluding certain transcripts from the record was not addressed.

Matter of Nickie M.A., 144 AD3d 1576 (4th Dept 2016)

CHILD ABUSE AND NEGLECT

Mother's Conduct Impaired Children's Emotional Condition or Placed Them in Imminent Danger of Such Impairment; Court Properly Awarded Sole Custody to Children's Fathers

In a neglect proceeding, Family Court determined that respondent mother neglected her two children; in related custody proceedings, the court awarded custody of the children to their respective fathers. The Appellate Division affirmed. The court properly determined that the mother's conduct impaired the children's emotional condition or placed them in imminent danger of such impairment. The evidence established that the mother alienated the children from their fathers, with the result that the child Isobella was confused whether her father was her real father. The mother also interfered with the fathers' visitation with the children,and made false allegations against the fathers or their significant others. Isobella was diagnosed with adjustment disorder and had poor behavior in school as a result of the mother's conduct. The evidence also established that the mother forced the child Cameron to lie about his father, and she videotaped the child stating those lies. The determinations to grant the fathers sole custody of the children were supported by a sound and substantial basis in the record, and would not be disturbed. The mother failed to preserve for review her contention that the Attorney for the Child for Isobella should not have substituted her judgment for that of the child or advocated against her wishes. In any event, that contention was without merit inasmuch as Isobella was five and six years old at the time of these proceedings, and the evidence showed that the child lacked the capacity for knowing, voluntary and considered judgment, or that following the child's wishes was likely to result in a substantial risk of imminent, serious harm to the child. Indeed, the evidence established that, if the AFC followed the child's wishes, that would have been tantamount to severing her relationship with her father.

Matter of Isobella A., 136 AD3d 1317 (4th Dept 2016)

Court Erred in Denying Motion to Vacate Order of Fact-finding

Family Court denied respondent mother's motion to vacate an order of fact-finding and disposition, which was entered in the consent of the parties. The Appellate Division reversed, and remitted to Family Court for further proceedings on the motion. The court erred in denying the motion on the sole ground that a direct appeal from that order was pending. It was well settled that no appeal lied from an order entered upon the parties' consent. Indeed, the mother's appeal from the consent order was dismissed for that very reason. Thus, the mother's sole remedy was to move in Family Court to vacate the order, at which time she could present proof in support of her allegations of duress, proof of which was completely absent from the record.

Matter of Annabella B.C., 136 AD3d 1364 (4th Dept 2016)

Court Did Not Err in Refusing to Make Finding of Derivative Neglect

Family Court dismissed the Department of Social Services petition to the extent that it alleged that the subject children were derivatively neglected by respondents. The Appellate Division affirmed. Although the court determined that respondents neglected a sibling of the subject children, and Family Court Act Section 1046 (a)(I) permitted evidence of that neglect to be considered in determining whether the subject children were neglected, the statute did not mandate a finding of derivative neglect, and such evidence typically could not serve as the sole basis of a finding of neglect. There was no evidence in the record that the neglect was repeated or was perpetrated on multiple victims, and it was unclear whether the subject children were nearby when the neglect occurred.

Matter of Madison J.S., 136 AD3d 1404 (4th Dept 2016)

Father's Contention Rejected that Family Court Erred in Basing Its Finding of Neglect on Matters Not Contained in Petition

Family Court found that respondent neglected his daughter. The Appellate Division affirmed. The father's contention was rejected that Family Court erred in basing its finding of neglect on matters not contained in the petition, e.g., on the subject child's failure to thrive while in the father's care. The record established that the court based its finding of neglect on the allegations in the petition, and only noted in a footnote that the child had failed to thrive. The court properly concluded that the subject child was in imminent danger of physical, emotional or mental impairment based on the father's long-standing history of mental illness and his failure to obtain treatment for it, and his failure to seek treatment for substance abuse issues. The court also found that the father had permitted the child to be cared for by respondent mother, whom the father knew to be an unsuitable caregiver. Further, the court properly relied upon an incident of domestic violence committed by the father as an additional ground for its finding of neglect.

Matter of Trinity E., 136 AD3d 1590 (4th Dept 2016)

Family Court Properly Exercised Jurisdiction Under UCCJEA, But Erred in Admitting into Evidence a 2012 Evaluation of Mother By a Forensic Psychologist Who Did Not Testify at Hearing

Family Court determined that respondent mother neglected the subject child and placed the child in the custody of petitioner. The Appellate Division reversed and remitted the matter for a new fact-finding hearing. The mother's contention was rejected that the court lacked subject matter jurisdiction over the petition under the Uniform Child Custody Jurisdiction and Enforcement Act, which was codified in Domestic Relations Law article 5-A. Shortly before the subject child was born, the mother relocated from New York to Pennsylvania, where she stayed with a cousin until the child was born. Two days after the child was born, petitioner commenced the neglect proceeding. The

court properly exercised jurisdiction over the petition on the ground that the child and her family had a significant connection with New York. The mother maintained an apartment in New York while she was at her cousin's residence, she attended mental health counseling and parenting classes in New York before the child was born, and most of her family resided in New York. However, the court erred in admitting into evidence at the fact-finding hearing a 2012 evaluation of the mother by a forensic psychologist who did not testify at the hearing. The report constituted hearsay, and it did not qualify for admission under Family Court Act Section 1046 (a) (iv). The error was not harmless given that the court quoted extensively from the report in its decision and that the determination of neglect was based largely on the findings contained within the report.

Matter of Chloe W., 137 AD3d 1684 (4th Dept 2016)

Affirmance of Finding that Mother Neglected and Derivatively Neglected Her Children

Family Court found that respondent mother neglected her two older children and derivatively neglected her two younger children. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that, among other things, the mother forced the two older children to leave the house for days at a time without planning for their care, which repeatedly resulted in their living in shelters or on the streets with no supervision, thereby placing them in imminent risk of harm. Furthermore, the evidence supported the finding of derivative neglect with respect to the two younger children inasmuch as the impaired level of parental judgment shown by the mother's behavior created a substantial risk of imminent danger to the younger children as well. The mother's actions demonstrated a fundamental defect in her understanding of the duties and obligations of parenthood and created an atmosphere detrimental to the physical, mental and emotional well-being of the younger children.

Matter of Ashley B., 137 AD3d 1696 (4th Dept 2016)

Mother Violated Two Orders of Disposition

Family Court determined that respondent mother violated two orders of disposition in underlying neglect proceedings, and derivatively neglected her youngest child. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that the mother violated the orders of disposition. Pursuant to the orders, the mother agreed, among other things, to not be under the influence of any substance, to complete a mental health assessment, to complete an alcohol and substance abuse evaluation and treatment, and to enforce a stay-away order of protection against the father of two of her children. Petitioner submitted evidence that the mother had consumed alcohol, did not complete a mental health assessment, and did not enforce the order of protection. The court properly found that petitioner established by a preponderance of the evidence that the mother derivatively neglected her youngest child.

Matter of Amariese L., 137 AD3d 1750 (4th Dept 2016)

Order Reversed Where Mother's Right to Due Process Denied

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division reversed and remitted to Family Court. The court erred in relying on a psychological evaluation of the mother that was not received in evidence. Due process required that the decision maker's conclusions must rest solely on legal rules and the evidence adduced at the hearing. Indeed, although the parties expressly stipulated that the evaluation would not be used as evidence in any fact-finding hearing in this matter, or as a basis for seeking to amend the neglect petition, the court relied heavily upon the evaluation in reaching its determination. Further, the court's failure to afford the mother the opportunity to cross-examine a key witness, i.e. a caseworker for the petitioner, constituted a denial of her right to due process, which also required reversal. The matter was remitted for a new hearing on the petition, if warranted. In light of information presented at oral argument, it appeared that a new hearing may no longer be necessary.

Matter of Dominic B., 138 AD3d 1395 (4th Dept 2016)

Affirmance of Finding of Neglect Where Father Chronically Misused Alcohol by Drinking to Point That He Was Intoxicated, Disoriented, Incompetent and Irrational

Family Court adjudged that respondent father neglected his three children and one stepchild. The Appellate Division affirmed. Family Court Act Section 1046 (a)(iii) created a presumption of neglect if the parent chronically and persistently misused alcohol and drugs, which, in turn, substantially impaired his or her judgment while the child was entrusted to his or her care. That presumption operated to eliminate a requirement of specific parental conduct vis-a-vis the child and neither actual impairment nor specific risk of impairment needed to be established. The finding of neglect was supported by a preponderance of the evidence. The father did not dispute the fact that he was driving while intoxicated at 2:00 p.m. on a Monday afternoon, and that he was involved in a motor vehicle accident at that time, and that he was so intoxicated that he was not able to perform the field sobriety tests. Moreover, the evidence at the hearing also established that, on "a couple different instances," law enforcement officers "had to catch the father from falling over or walking into traffic." The corroborated statements of the children established that the father was mean and aggressive when he had been drinking; that he pushed the eldest child to the ground on one occasion when he had been drinking; that there were times when the parents were so intoxicated that the eldest child had to cook for the children; that there were times when the parents were drinking that the eldest child, who had to go to work, made arrangements for the youngest child to go to friends' houses; that there was at least one time when the youngest child hid under furniture when respondents were drinking and fighting; and that the father, who was physically aggressive with one child in particular when the father was drinking, accidently pulled the youngest child's hair while

trying to grab the other child. Thus, petitioner established that the father chronically misused alcohol by drinking to the point that he was intoxicated, disoriented, incompetent and irrational. The father's failure to rebut the presumption of neglect obviated the requirement that petitioner present evidence establishing actual impairment or risk of impairment. In any event, the evidence established that the children's physical, mental or emotional conditions were impaired or were in imminent danger of becoming impaired as a result of the father's failure to exercise a minimum degree of care in providing the children with proper supervision and guardianship by misusing alcoholic beverages to the extent that he lost self-control of his actions.

Matter of Timothy B., 138 AD3d 1460 (4th Dept 2016)

Petition Dismissed Where Nonhearsay Evidence Insufficient to Establish That Child's Physical, Mental or Emotional Condition Was Impaired or in Imminent Danger of Being Impaired

Family Court determined that respondent father neglected the subject child, among other things. The Appellate Division reversed and dismissed the petition against respondent. Petitioner failed to meet its burden of establishing neglect by a preponderance of the evidence. At the fact-finding hearing, only competent, material and relevant evidence was admissible. The evidence admitted in support of the petition consisted primarily of the caseworker's testimony regarding the mother's out-of-court statements, as well as portions of a police report containing the mother's statements to the police. The mother's out-of-court statements constituted hearsay, and were not admissible against the father in the absence of a showing that they came within a statutory or common-law exception to the hearsay rule. Petitioner failed to make such a showing. Inasmuch as the nonhearsay evidence in the record was insufficient to establish that the child's physical, mental or emotional condition was impaired or in imminent danger of being impaired as a consequence of the father's conduct, the petition was dismissed.

Matter of Tyler M., 139 AD3d 1401 (4th Dept 2016)

Court Erred in Denying Respondent's Request to Appear By Telephone at Dispositional Hearing

In an order of disposition, Family Court continued the placement of respondent mother's children in the care and custody of petitioner, among other things. The Appellate Division modified by vacating the disposition and remitted the matter for a new dispositional hearing. The order of disposition was properly entered upon the mother's default based on her failure to appear on the date scheduled for the dispositional hearing. The mother's failure to appear constituted a default, where neither her retained attorney, nor the new attorney that the court assigned for the mother, was both willing and authorized to proceed with the hearing in the mother's absence. DSS established by a preponderance of the evidence that the children were neglected as a result of the mother's mental illness. A finding of neglect based on

mental illness did not need to be supported by a particular diagnosis or by medical evidence. However, pursuant to Domestic Relations Law Section 75-j, the court should have allowed the mother to appear by telephone at the dispositional hearing. The record established that the mother moved to Florida, with financial assistance from DSS, during the period between the fact-finding hearing and the dispositional hearing. She requested permission to make future appearances by telephone, and the court denied the request, citing "the facts and circumstances of the case" and its preference that the mother be present "as any party of the proceeding should be present." Section 75-j did not require courts to allow testimony by telephone or electronic means in all cases. However, the court abused its discretion in failing to consider the impact of the mother's limited financial resources on her ability to travel to New York.

Matter of Thomas B., 139 AD3d 1402 (4th Dept 2016)

Appeal From Order for Services Dismissed as Moot

Family Court entered an order for services in a neglect proceeding. The Appellate Division dismissed the appeal as moot. The order was superceded by a subsequent order that directed the removal of the subject children. Therefore, any decision concerning the propriety of the order for services would not directly affect the rights and interests of the parties.

Matter of Azaria A., 140 AD3d 1634 (4th Dept 2016)

Finding of Neglect Reversed Where Subject Children Were Entitled to Appointment of Separate Attorneys to Represent Their Conflicting Interests

Family Court determined that respondent mother neglected the subject children, and placed the children in the custody of the petitioner. The Appellate Division reversed and remitted for the appointment of new counsel for the children and a new fact-finding hearing. The children's statements, together with the negative inference drawn from the mother's failure to testify, were sufficient to support the finding of neglect. However, children in a neglect proceeding were entitled to effective assistance of counsel. The appellate AFC for Katie and the appellate AFC for Brian, two of the subject children, contended that Katie and Brian were deprived of effective assistance of counsel by the trial AFC who jointly represented them as well as their sister, Alyssa, during the proceeding. Katie's appellate AFC contended that the trial AFC never met with or spoke to Katie. There was no indication in the record whether the trial AFC consulted with Katie. The contention of Katie's appellate AFC was therefore based on matters outside the record, and was not properly before the Court. However, Brian was deprived of effective assistance of counsel because the trial AFC failed to advocate his position. There was no dispute that the trial AFC took a position contrary to the position of two of the subject children, Brian and Alyssa, both of whom maintained that Katie was lying with respect to her allegations against the mother. Alyssa expressed a strong desire to continue living with the mother, while Brian said that he wanted to live with either the mother or his father, who entered an admission of neglect prior to the hearing

and was thus not a custodial option. Nevertheless, when the mother moved to dismiss the petition at the close of petitioner's case based on insufficient evidence of neglect, the trial AFC opposed the motion, stating that, although this was "probably not a very strong case," petitioner had met its burden of proof. Also, during his cross-examination of petitioner's sole witness, the trial AFC asked questions designed to elicit unfavorable testimony regarding the mother, thus undercutting Brian and Alyssa's position. Inasmuch as the trial AFC failed to advocate Brian and Alyssa's position at the fact-finding hearing, he was required to determine that one of the two exceptions to the Rule of the Chief Judge applied, as well as to inform the court of the children's articulated wishes. The trial AFC did not fulfill either obligation. Indeed, the record established that neither of the two exceptions applied. Because all three children were teenagers at the time of the hearing, there was no basis for the trial AFC to conclude that they lacked the capacity for knowing, voluntary and considered judgment, and there was no evidence in the record that following the children's wishes was likely to result in a substantial risk of imminent, serious harm to the children. According to the trial AFC, the most serious concern he had about the children was that they frequently skipped school which, although certainly not in their long-term best interests, did not pose a substantial risk of *imminent* and serious harm to them (emphasis in the original). Similarly, the fact that the mother may have occasionally used drugs in the house, and was thus unable to care for the children, did not establish a substantial risk of imminent and serious harm to Brian or Alyssa. The fact that the mother, on a single occasion, may have struck Katie on the arm with a belt, leaving a small mark, did not establish a substantial risk of imminent and serious harm to Brian or Alyssa if they continued living with the mother. Although the record did not reveal whether the trial AFC consulted with Katie, it was clear that Katie's position with respect to the neglect proceeding differed from that of her siblings. Under the circumstances, it was impossible for the trial AFC to advocate zealously the children's unharmonious positions. Thus, the children were entitled to appointment of separate attorneys to represent their conflicting interests. The dissent agreed with the majority that petitioner established by a preponderance of the evidence that the children were neglected by the parents. The trial AFC understandably argued in summation that petitioner had proven its case. Although the trial AFC did not set forth the wishes of the children, the dissent noted that the court was aware that Alyssa wanted to live with the mother, that Brian wanted to live with the mother or father, and that Katie wanted to live with an aunt. The dissent concluded that the trial AFC was reasonably of the view, in light of the evidence supporting a finding of neglect, that there was a substantial risk of imminent, serious harm to the children if they remained in the custody of the parents, and was not ineffective for advocating a finding of neglect.

Matter of Brian S., 141 AD3d 1145 (4th Dept 2016)

Mother Neglected Children by Misuse of Alcohol

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. The court properly applied the presumption of neglect where a parent chronically and persistently misuses alcohol and drugs, which

substantially impairs judgment while the child is entrusted to the parent's care. The caseworker testified that the mother admitted drinking vodka for days at a time and that she felt guilty because of the effect that her and her husband's drinking had on the children. The children made statements to the caseworker that there were times when the parents were so intoxicated that the eldest son had to cook for his siblings and times when he had to make arrangements for the youngest daughter to go to friends' houses so he could go to work. On at least one occasion, the youngest daughter hid under furniture to avoid the parents, who were drinking and fighting. There was also evidence that the mother was too intoxicated to protect the children from her husband, who became physically abusive towards the children when he was drinking. The mother failed to rebut the presumption of neglect, thus obviating the requirement that petitioner present evidence establishing actual impairment or a risk of impairment.

Matter of Hunter K., 142 AD3d 1307 (4th Dept 2016)

Contention That AFC Had Conflict Unpreserved

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. Petitioner met its initial burden by establishing that the mother's home was unsafe and unsanitary and that the mother failed to follow up with the physician of one of the children as instructed by hospital emergency department providers after the child was examined for an alleged incident of sexual abuse. There was a sound and substantial basis for the court's ultimate determination that the children were neglected as a result of the mother's failure to exercise a minimum degree of care. The mother 's contention that the AFC had a conflict was raised for the first time on appeal and was therefore unpreserved for review.

Matter of Mary R.F., 144 AD3d 1493 (4th Dept 2016)

Determination of Permanent Derivative Neglect Based On Evidence That Other Children Neglected Affirmed

Family Court determined that respondent mother derivatively neglected the subject child. The Appellate Division affirmed. The court properly determined that the child was derivatively neglected based upon evidence that the mother's four other children were determined to be neglected children, including evidence that the mother failed to address the mental health issues that led to those neglect determinations and the placement of those children with petitioner. Moreover, the neglect finding with respect to the other four children was entered only two days before the subject child was born and thus the prior finding was so proximate in time to the instant proceeding that it could reasonable be concluded that the condition still existed.

Matter of Amyn C., 144 AD3d 1690 (4th Dept 2016)

Mother's Drug Use Created Presumption of Neglect

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division affirmed. The court properly applied the presumption of neglect where a person repeatedly misused drugs, which would ordinarily have the effect of producing in the user a substantial state of stupor or intoxication or a substantial impairment of judgment, as prima facie evidence that a child of that person is neglected, eliminating the need that petitioner present evidence establishing actual impairment or a risk of impairment. Here, there was evidence that the mother had been prescribed morphine for fibromyalgia; that she admitted to a caseworker that she had been taking more than prescribed; that she often slurred her speech; that she fell asleep at a time when the two-year-old child was awake and she was his sole caretaker; that the father did not believe that the child was safe alone with the mother overnight; and that she once bought and smoked marijuana to deal with the effects of morphine withdrawal.

Matter of Anthony L., 144 AD3d 1690 (4th Dept 2016)

Court Properly Determined That Subject Children Were Neglected as Result of Mother's Mental Illness

Family Court adjudged that respondent mother neglected her two youngest children as the result of her mental illness. The Appellate Division affirmed. The mother's contention was rejected that her mental illness was not causally related to any actual or potential harm to the children. While there was conflicting testimony whether the subject children were present during the mother's episodes of paranoid delusions, the statements of the mother's two older children describing the harmful emotional impact they experienced as a result of the mother's behavior during her delusions demonstrated the risks faced by the subject children should they be similarly exposed to such behavior. Furthermore, the evidence established that the subject children had been present during a prior incident in which the mother called the police with a complaint of footprints outside her home, but no such footprints were found by the police. The mother engaged in bizarre and paranoid behavior toward the older children and such behavior took place in the presence of the subject children at times, thereby exposing them to an imminent danger of their physical, mental or emotional condition becoming impaired. Moreover, the mother displayed a lack of insight into the effect of her illness on her ability to care for the subject children.

Matter of Matigan G., 145 AD3d 1418 (4th Dept 2016)

Mother Neglected Child by Exposing Her to Deplorable Living Conditions

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. Petitioner presented evidence establishing that the child was in imminent danger because she was exposed to unsanitary and deplorable living conditions, including floors covered in animal feces and ankle-deep piles of garbage. The evidence also established that the mother's residence did not contain a bed or diapers for the child. Any error in receiving petitioner's exhibits in evidence was

harmless because the record otherwise contained ample admissible evidence to support the court's determination that the mother neglected the child.

Matter of Danaryee B., 145 AD3d 1568 (4th Dept 2016)

Affirmance of Finding of Educational Neglect

Family Court determined that respondent mother neglected the subject children and awarded custody of them to nonparty father. The Appellate Division affirmed. Proof that a minor child was not attending a public or parochial school in the district where the parent resided made out a prima facie case of educational neglect pursuant to Section 3212 (2) (d) of the Education Law. Unrebutted evidence of excessive school absences was sufficient to establish educational neglect. The testimony of the caseworker established that two of the children had a combined number of approximately 150 unexcused absences during the most recent school year. The mother failed to rebut that evidence. In addition, petitioner established the presumption of neglect by presenting the testimony and notes of the caseworker, who testified that the mother admitted to using heroin and failed to take meaningful action to treat her addiction, and that the mother's drug use impaired her ability to function. The mother presented no evidence to rebut the presumption of neglect.

Matter of Kenneth C., 145 AD3d 1612 (4th Dept 2016)

Father Abused One Child and Derivatively Abused Other Children

Family Court determined that respondent father abused the subject child Kordell and derivatively abused the other subject children. The Appellate Division affirmed. Petitioner presented a prima facie case of child abuse. Medical testimony of a child abuse physician established that Kordell sustained second-degree burns on his back, left side and upper arm, in a pattern that did not fit any of the histories that were given and was inconsistent with Kordell inflicting the burns on himself. It was undisputed that respondent was the sole caregiver for the child at the time the burns were inflicted. Respondent failed to rebut the presumption that he was culpable. Further, Kordell's statements that the father burned him were sufficiently corroborated by the medical testimony and the caseworker's observations of the injuries. To the extent that respondent contends that Kordell's statements were consistent with his own descriptions of the incident, the court specifically found that the father's statements were internally inconsistent and were not corroborated by the medical testimony.

Matter of Charity M., 145 AD3d 1615 (4th Dept 2016)

CHILD SUPPORT

Court Properly Imputed Income to Respondent Father

Family Court denied respondent father's objections to the order of the Support Magistrate that granted the mother's petition seeking an upward modification of the father's child support obligation. The Appellate Division affirmed. At the hearing, the father testified that he was currently unemployed, but that he had worked for a company "off and on" for over five years, making $10 per hour, and that he did not have any medical disabilities preventing him from working. Family Court determined that the Support Magistrate imputed income to the father of $20,800 per year. The determination was supported by the record and was based on the relevant factors.

Matter of Taylor v Benedict, 136 AD3d 1295 (4th Dept 2016)

Court Erred in Failing to Consider Respondent's Objections to Support Magistrate's Denial of Her Cross Petition for Downward Modification

Family Court adjudged that respondent mother willfully violated a prior order of child support and denied her cross petition for downward modification of her child support obligation. The Appellate Division modified by reinstating respondent's objections to the Support Magistrate's denial of her cross petition, and remitted for further proceedings. Family Court properly confirmed the finding of the Support Magistrate that respondent willfully violated the child support order. Although respondent presented evidence of a medical condition disabling her from work, that evidence related only to the period after the violation petition was filed, not the two-month period in which respondent failed to comply with the support order before the petition was filed. Thus, respondent failed to demonstrate that she had made reasonable efforts to obtain gainful employment to meet her child support obligation. However, the court erred in failing to consider respondent's objections to the Support Magistrate's denial of her cross petition for a downward modification of child support. Instead of reviewing respondent's objections in accordance with Family Court Act Section 439 (e), the court implicitly dismissed them when it stated on the record that, if the cross petition was denied by the Support Magistrate, respondent "will have to file another one."

Matter of Mandile v Deshotel, 136 AD3d 1379 (4th Dept 2016)

Court Erred in Including Amount of Maintenance Awarded to Defendant in Determining Her Income

Supreme Court directed defendant wife to pay plaintiff husband the sum of $142.53 per week in child support, among other things. The Appellate Division modified the judgment of divorce by decreasing defendant's child support obligation to $25 per month, and remitted the matter for further proceedings. The court erred in including the amount of maintenance awarded to defendant in determining her income for purpose of calculating the amount of child support that she was required to pay plaintiff. When the

amount of maintenance was omitted from the calculation of defendant's income, defendant's income fell below the poverty line. Thus, the court erred in directing defendant to pay plaintiff more than the sum of $25 per month in child support. Defendant was entitled to recoupment of her child support overpayments, and the matter was remitted to determine the amount of recoupment that plaintiff owed to defendant. Although there was a strong public policy against recoupment of child support overpayments, recoupment was appropriate under the limited circumstances of this case. The record established that defendant's income was below the poverty line, and that plaintiff held a high-income job.

Weidner v Weidner, 136 AD3d 1425 (4th Dept 2016)

Order Reversed Where Respondent Denied His Right to Counsel

Family Court adjudged that respondent willfully failed to obey a court order of child support and placed respondent on probation for a period of three years. The Appellate Division reversed and remitted the matter for a new hearing. Although the Support Magistrate properly advised respondent that he had the right to counsel, the Support Magistrate failed to make a searching inquiry to ensure that his waiver of the right to counsel was a knowing, voluntary and intelligent choice. Thus, respondent was denied his right to counsel. To the extent that the Court's decision in *Matter of Huard v Lugo* (81 AD3d 1265, 1266, lv denied 16 NY3d 710) required the preservation of a contention that the Support Magistrate erred in allowing respondent to proceed pro se at a fact-finding hearing, that decision was no longer to be followed.

Matter of Girard v Neville, 137 AD3d 1589 (4th Dept 2016)

Appeal From Order Revoking Mother's Suspended Sentence and Committing Her to Jail for Willful Failure to Obey Child Support Order Dismissed as Moot

Family Court revoked respondent mother's suspended sentence and committed her to jail for a period of six months for her willful failure to obey a child support order. The Appellate Division dismissed. In a prior order, the court confirmed the Support Magistrate's determination that the violation of the child support order was willful and imposed a sentence of six months, which it suspended on the condition that respondent paid $75 per month, commencing on a certain date. It was undisputed that respondent failed to make the first monthly payment, but instead made two payments on the date on which the second payment was due. Respondent's contention was moot that the court erred in revoking the suspended sentence and committing her to jail inasmuch as she had served her sentence.

Matter of Brookins v McCann, 137 AD3d 1726 (4th Dept 2016)

Father Willfully Violated Child Support Order

Family Court denied respondent father's written objections to the order of the Support

Magistrate finding him in willful violation of a child support order. The Appellate Division affirmed. The father's contention was rejected that petitioner mother was required to provide a written record detailing the missed child support payments. The mother's unequivocal testimony that the father failed to pay any child support from October 1995 to December 2004 was sufficient. The father testified that he paid child support by check during the time period in question, but he failed to submit any documentary evidence in support of that assertion. In light of the Support Magistrate's superior position to assess the credibility of the witnesses, there was no was no reason to disturb the determination that the father willfully violated the child support order.

Matter of Richards v Richards, 137 AD3d 1749 (4th Dept 2016)

Reversal of Order Where Respondent Denied His Right to Counsel

Family Court found respondent father in willful violation of a child support order and imposed a suspended sentence of six months of incarceration. The Appellate Division reversed and remitted the matter for a new hearing. The father was denied his right to counsel at the hearing before the Support Magistrate to determine whether he was in willful violation of the support order. Petitioner's contention was rejected that the issue required preservation. At the initial appearance, the Support Magistrate informed the father only that he had "the right to hire a lawyer or talk for himself," asked the father to choose between those options, and conducted no further inquiry when the father chose to proceed pro se. Thus, the Support Magistrate failed to inform the father of his right to have counsel assigned if he could not afford to retain an attorney, and also failed to engage the father in the requisite searching inquiry concerning his decision to proceed pro se in order to ensure that the father had knowingly, intelligently and voluntarily waived his right to counsel.

Matter of Soldato v Caringi, 137 AD3d 1749 (4th Dept 2016)

Court Erred in Dismissing Violation Petition Seeking Revocation of Suspended Sentence and Incarceration of Respondent

Family Court dismissed the mother's violation petition. The Appellate Division reversed, reinstated the violation petition and remitted for further proceedings. The mother commenced a violation proceeding in November 2013, alleging that respondent father had not complied with the terms of an order entered in February 2010, and seeking to have the suspended sentence revoked and the father incarcerated. The court erred in summarily dismissing the petition on the ground that the Support Magistrate's November 2010 order directing that all outstanding arrears were to be reduced to judgment stood in lieu of the suspended sentence inasmuch as the Support Magistrate had entered judgment for the entire amount of arrears. Pursuant to Family Court Act Section 451(1), Family Court had continuing plenary and supervisory jurisdiction over a support proceeding until its directives were completely satisfied, and the suspension of an order of commitment could be revoked at any time. Moreover, the entry of a judgment for child support arrears was a form of relief that stood in addition to any and

every other remedy which could be provided under the law. Thus, an order conditioning a suspended sentence on payments toward accumulated arrears was enforceable even if the arrears were later reduced to judgment. The court's alternative ground for dismissing the petition was also erroneous. The mother made a prima facie showing that the father willfully violated the February 2010 order through her submission of a certified calculation showing that he had not made all of the required payments, and the record failed to establish at this junction that the father's alleged violation of that order was not willful.

Matter of Brumfield v Brumfield, 138 AD3d 1422 (4th Dept 2016)

Order Modified Where There Was No Support in Record for Support Magistrate's Determination Not to Impute Income to Mother

Family Court denied respondent father's written objections to an order of the Support Magistrate that granted the mother's petition seeking to modify the order of support based upon the more that 15% increase in the father's income, and denied his petition seeking a determination imputing income to the mother in the amount of $100,000. The Appellate Division modified and remitted. The father's contention was rejected that the court erred in denying his objections related to the calculation of child support on the amount of income over the statutory cap of $141,000. The Support Magistrate properly considered the disparity in the parties' incomes and the lifestyles the children would have enjoyed had the marriage remained intact in deciding to include income over the statutory cap in determining the child support obligation. Further, the Support Magistrate set forth the basis for her determination not to apply the statutory formula to the amount of income over the statutory cap and related her determination to the Family Court Act Section 413 (1) (f) factors. However, the court erred in determining that the Support Magistrate did not abuse her discretion in imputing annual income to the mother of $20,000, which included $13,164 that she received in Social Security income. There was no support in the record for the determination not to impute income to the mother. The record established that the mother was 65 years old and had not worked since 2007, when she closed a Montessori school that she operated. The record further established that the mother had a bachelor's degree and an MBA, and that she graduated from law school but did not pass the bar exam and was therefore not admitted to the practice of law. The mother testified that, prior to the hearing, she sought only jobs as an attorney, for which she is not qualified. Thus, the mother had not sought employment for which she was qualified since 2007. Income could properly be imputed when there was no reliable records of a parent's actual employment income or evidence of a genuine and substantial effort to secure gainful employment. The record was sufficient to determine that, based upon her education and experience, the mother had the ability to earn income in the amount of $20,000 per year, exclusive of the Social Security income. Therefore, the corrected order was modified accordingly, and the matter remitted for a recalculation the respective child support obligations of the parties and their respective obligations for uninsured medical expenses.

Matter of Muok v Muok, 138 AD3d 1458 (4th Dept 2016)

Court Erred in Denying Father's Objections to Support Magistrate's Orders

Family Court denied petitioner father's objections to two orders of the Support Magistrate finding a violation of a prior support order and modifying the prior support order by, among other things, requiring respondent mother to pay child support to the father based on the subject child's change of residence to that of the father and by imputing income to the father. The Appellate Division reversed and remitted to Family Court for further proceedings on both petitions. The court erred in denying the father's objections to the Support Magistrate's orders because he was not properly advised of his right to an attorney on the violation petition brought by the mother, and the Support Magistrate erred in failing to conduct a proper hearing on the father's modification petition. While a hearing on a petition for modification of a support obligation did not need to follow any particular format, the hearing was inherently flawed. The father was not offered an opportunity to testify, nor was he permitted to present the sworn testimony of any other witnesses. The cursory handling of this matter by the Support Magistrate did not provide a substitute for the meaningful hearing to which the father was entitled.

Matter of Gerhardt v Baker, 140 AD3d 1635 (4th Dept 2016)

Affirmance of Order Directing Each Party to Contribute Equally to College Expenses

In a post-divorce proceeding, Supreme Court determined that each party should contribute equally to the college expenses of their eldest daughter. The Appellate Division affirmed. Pursuant to their "Child Support Agreement" (the "Agreement"), the parties contemplated that their children would attend college, and they agreed that the costs would be divided "between the parties as they shall then agree or as shall then be determined by a Court of competent jurisdiction." The parties further agreed that, "in the event a child shall attend Nichols [School], the respective contributions of the parties to the cost of said schooling shall be a factor in determining the contribution of each party to said child's college expenses." The court's statement in its decision concerning the mother's willingness to pay a greater share of the costs of the children's education at Nichols School was supported by the record, including the terms of the Agreement. Inasmuch as the parties' respective contributions to those costs was but one factor to consider in determining their obligations to pay college expenses, the court also properly considered the circumstances of the case, the circumstances of the respective parties, and the best interests of the child. The mother's contention was rejected that the order was inconsistent with the court's prior order directing the father to pay 60% and the mother to pay 40% of the eldest son's college expenses. The prior order was based upon different evidence, and it explicitly contemplated a need for modifications of the parties' obligation to contribute toward college as the younger children [including the eldest daughter] matriculate.

Marshall v Hobika, 140 AD3d 1690 (4th Dept 2016)

Court Erred in Applying CSSA to Combined Parental Income in Excess of Statutory Cap

Supreme Court directed plaintiff mother to pay defendant father child support in the amount of $441 per week, plus 57% of whatever bonus income she might receive from her employment, minus credits for the costs of airline travel to Texas for her and the parties' children. The Appellate Division modified. The court failed to articulate a proper basis for applying the Child Support Standards Act [CSSA] to the combined parental income in excess of the statutory cap. Furthermore, the record afforded no support for the court's determination to apply the child support percentage to the total combined parental income exceeding the $141,000 per year cap. The court made no factual finding that the children had financial needs that would not be met unless child support were ordered to be paid out of parental income in excess of $141,000. Even if the court made such a finding, there was no evidence in the record to support it. The court's finding that the mother had CSSA income of $96,428 was adopted, as was the court's finding that the mother, in her current job, had no history of bonuses upon which any additional income could be imputed to her beyond her base salary. The father's CSSA income was found to be $74,664. The combined parental CSSA income was $171,092. Thus, the mother's pro rata share of the combined parental income was 56.36%. That multiplier, as well as the CSSA percentage of 25% for two unemancipated children, was applied to the $141,000 cap amount. Thus, the mother's basic child support obligation was $19,726 per year, or $378.84 per week.

Bandyopadhyay v Bandyopadhyay, 141 AD3d 1099 (4th Dept 2016)

Court Erred in Determining Amount of Children's College Expenses

Family Court denied the respective objections of the parties to the order of the Support Magistrate. The Appellate Division modified by granting some objections and vacating other ordering paragraphs. Paragraph 40 of the parties' judgment of divorce provided that the parties shall pay for that portion of the children's college tuition charges which were not covered by the college tuition benefit program (CTBP) through the mother's employment, including tuition, room and board for a maximum of four years, in proportion to their respective incomes, regardless which college the children attended. This provision was ordered by the court and because no issue was raised about it on the father's prior appeal, the father was precluded from raising the issue whether the court erred in ordering him to pay college expenses on this appeal. Because the mother was no longer employed at Hamilton College and the children were therefore no longer eligible to receive the CTBP, the court erred in reducing the college expenses by that benefit. However, the court properly denied the mother's objection to the court's further reduction of the college expenses by the amount contributed by the grandparents as a gift to the children. The court did not err in denying the mother's objection to the determination that the father did not willfully violate paragraph 40, particularly considering the uncertainty about the actual amount of college expenses and further did not err in denying the father's objection to the determination that the father willfully failed to disclose to the mother his 2012 and 2013 income. The court erred in denying

the father's objection to the determination that obligated him to pay college expenses for one of the children after he turned 21, inasmuch as there was no agreement to that effect. A prior order provided that the father would continue the children on his health plan and be responsible for 100% of the health insurance premiums and the mother would be responsible for all uncovered medical expenses. The court erred, therefore, in denying the father's objection to the determination that modified the prior order by ordering the father to pay his pro rata share of the unreimbursed medical expenses.

Matter of Lewis v Lewis, 144 AD3d 1659 (4th Dept 2016)

Support Arrears Time-Barred

Family Court denied petitioner mother's objection to the order of the Support Magistrate. The Appellate Division affirmed. The Support Magistrate erred in determining that the six-year limitations period in CPLR 213 (1) applied to a 1986 judgment against the father for child support arrears. The judgment was governed by the 20-year period of limitations in CPLR 211 (b). However, even under the 20-year limitations period, the proceeding to enforce the judgment was untimely. The court did not err in confirming the Support Magistrate's finding that the statute of limitations was not tolled pursuant to CPLR 207 inasmuch as the record supported the finding. Although the mother claimed the father was absent from the state for periods of time, the father testified and submitted evidence establishing that her resided in New York during the relevant period. The court did not err in confirming the finding of the Support Magistrate that the father's conduct did not restart the statute of limitations.

Matter of Gibbs v Gibbs, 144 AD3d 1669 (4th Dept 2016)

Family Court Properly Denied Respondent's Application to Vacate Order Entered Upon His Default That Determined He Willfully Violated Child Support Order

Family Court denied respondent father's application to vacate an order entered upon his default that determined he willfully violated a child support order. The Appellate Division affirmed. Although default orders were disfavored in cases involving the custody or support of children, that policy did not relieve the defaulting party of the burden of establishing a reasonable excuse for the default or a meritorious defense. Even assuming, arguendo, that the father established a reasonable excuse for his failure to appear for the trial based upon allegedly confusing correspondence from petitioner mother's attorney with respect to whether the mother had withdrawn her petition, the father failed to establish a meritorious defense. The father repeated arguments in his affidavit that had been unsuccessful in prior support proceedings, i.e., that he received Social Security benefits and that he was unable to work. The father failed to establish his inability to work, and his conclusory assertions were not sufficient to establish a meritorious defense.

Matter of Shehatou v Louka, 145 AD3d 1533 (4th Dept 2016)

Supreme Court Properly Declined to Set Aside Child Support Provisions of Parties' Judgment of Divorce

Supreme Court declined to set aside the child support provisions of the parties' judgment of divorce. The Appellate Division affirmed. The court properly determined that defendant father failed to meet his burden of establishing that the parties' 2009 Property Settlement and Separation Agreement (the Agreement) was procured by fraud on the part of plaintiff mother. The evidence established that the parties agreed to use the 2003 income information to expedite the divorce and that defendant carefully read the Agreement before he signed it. Defendant raised for the first time on appeal his contention that the child support provisions of the judgment should be vacated on the ground that those provisions did not comply with the requirements of the Child Support Standards Act (*see* Domestic Relations Law Section 240 [1-b] [b], [h]), and thus that contention was beyond appellate review. Although plaintiff properly conceded that the court erred in precluding defendant from questioning plaintiff's former attorney regarding certain factual matters, the error was harmless inasmuch as follow-up questions would have necessarily involved confidential communications made for the purpose of giving or obtaining legal advice. Furthermore, there was no allegation that the communication between plaintiff and her former attorney was made in furtherance of a fraudulent scheme, or an alleged breach of fiduciary duty or an accusation of some other wrongful conduct. Thus, the crime-fraud exception did not apply.

Bryant v Carty, 145 AD3d 1543 (4th Dept 2016)

Court Properly Denied Father's Request For Reduced Child Support Obligation

Family Court denied petitioner father's objections to the order of the Support Magistrate that denied his request for a reduction of his child support obligation. The Appellate Division affirmed. The Support Magistrate did not err in directing the father to apply to the Social Security Administration for a change in the representative payee of the subject children's social security disability (SSD) benefits from the father to petitioner mother. The evidence in the record established that the mother had primary physical custody of the subject children, and that their needs were best served by having their SSD benefits paid to her. Because those payments were to be used for the benefit of the children and the father failed to establish that he had done so, the Support Magistrate did not err in directing that he pay to the mother the amount of those benefits that he received after the mother filed the petition seeking those payments for the benefit of the children. The Support Magistrate did not award those funds to the mother as support arrears. Instead, the Support Magistrate directed the father to provide the mother, the children's primary custodian, with funds that were for the children's social security payment that the father received and did not give to the mother, and that he failed to establish were used for the children's benefit. Family Court also properly denied the father's objection to that part of the Support Magistrate's order that rejected his request for a reduction of his child support obligation. The fact that the Support Magistrate directed the father to request that the Social Security Administration designate the mother as the children's representative payee, together

with the father's resulting loss of the use of that money, did not provide a basis for a downward modification of the father's child support obligation.

Matter of Holeck v Beyel, 145 AD3d 1600 (4th Dept 2016)

CUSTODY AND VISITATION

Court Erred in Conditioning Resumption of Visitation Upon Mother's Completion of Evaluations and Compliance with All Treatment Recommendations

Family Court awarded petitioner father sole custody and placement of the parties' child and suspended visitation between the mother and the child. Family Court's determination to suspend the mother's visitation was supported by a sound and substantial basis in the record inasmuch as the evidence presented at the hearing established that such visitation was detrimental to the child's welfare. However, the court lacked authority to condition the resumption of visitation upon the mother's completion of mental health and drug and alcohol evaluations and compliance with all treatment recommendations. Therefore, the order was modified accordingly.

Matter of Waite v Clancy, 136 AD3d 1287 (4th Dept 2016)

Order Denying Mother's Modification Petition Reversed; Mother's Modification Petition Granted Where Father Resorted to Excessive Physical Discipline of Parties' Three-Year-Old Daughter

Family Court denied the mother's petition for modification of a prior consent order. The Appellate Division reversed, granted the petition, and remitted the matter to Family Court to fashion an appropriate visitation schedule. The court erred in determining that the mother failed to establish a sufficient change in circumstances to warrant an inquiry into the best interests of the children. The record established that the father telephoned the mother to ask that she pick up the parties' three-year-old daughter from his residence in Pennsylvania because he was unable to handle her alleged misbehavior. Upon retrieving the child, the mother observed and photographed extensive bruising on the child's body, as well as scrapes on her knees, which the father later attributed to the child's increasingly serious tantrums that began while she was in his care. The daughter's injuries were observed by a Child Protective Services (CPS) investigator, and the daughter disclosed to the investigator that the father struck her with a belt and that she sustained the scrapes on her knees from kneeling on a "cat scratcher" as a form of punishment. The son's statements to the investigator corroborated the daughter's account of the corporal punishment. In addition, the father admitted that he once spanked the daughter with a belt and made her kneel on the "cat scratcher." Although the father testified that each of those types of physical discipline was a one-time occurrence, the records of the daughter's medical examination documenting that the daughter had multiple bruises all over her body in different stages of healing, as well as the son's statements with respect to the frequency of the father's physical discipline, supported the finding that the father repeatedly inflicted excessive corporal punishment on the daughter. Thus, there was a sufficient change in circumstances to warrant an inquiry into the best interests of the children. Although the court determined that the mother failed to establish a sufficient change in circumstances warranting an inquiry into the best interests of the children, it nevertheless determined that it was in the children's best interests to continue joint legal custody and primary physical placement

with the father. The court's custody determination lacked a sound and substantial basis in the record. The record established that the father resorted to excessive physical discipline of the daughter, which resulted in an indicated CPS report, and the court erred in discounting that report in favor of an unfounded report by a Pennsylvania investigator who closed his case because the children had been removed to New York. The record also established that the father struck the son with a belt as punishment, and exposed him to a home environment wherein he witnessed the excessive corporal punishment directed at the daughter. The record established that the mother's involvement with the son's schooling was not significantly different from that of the father. In addition, the son's wish to reside with the father was not determinative in light of his young age. Moreover, the court improperly focused on the mother's past sexual behavior and relationships despite the absence of any showing that such conduct may have adversely affected the welfare of the children. To the extent that the court found that the mother's relationship and pregnancy affected the children's living arrangements at the mother's residence, those conditions were not significantly different from those at the father's residence.

Matter of DeJesus v Gonzalez, 136 AD3d 1358 (4th Dept 2016)

Award of Sole Legal and Physical Custody to Mother Upheld Where Father Interfered With Mother's Relationship With the Child

Family Court awarded petitioner mother sole legal and physical custody of the subject child, with visitation to the father. The Appellate Division affirmed. Even assuming, arguendo, that respondent father was correct that the mother was required to establish that a significant change in circumstances occurred since the entry of the custody order, rather than from the date of the court appearance upon which the order was based, the mother established the requisite change in circumstances subsequent to the entry of the prior order. The evidence at the hearing established that the parties have an acrimonious relationship and were not able to communicate effectively with respect to the needs and activities of their child, and it was well settled that joint custody was not feasible under those circumstances. The court properly considered the appropriate factors in making its custody determination. The record supported the court's determination that the mother had attempted to foster a relationship between the father and the child, while the father interfered with the mother's relationship with the child by, among other things, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, repeatedly telling the child that the mother was irresponsible and unintelligent, and limiting the mother's access to the child or placing absurd restrictions on such access. It was well settled that a concerted effort by one parent to interfere with the other parent's contact with the child was so inimical to the best interests of the child that it, per se, raised a strong probability that the interfering parent was unfit to act as a custodial parent.

Matter of Ladd v Krupp, 136 AD3d 1391 (4th Dept 2016)

Court Properly Denied Father's Post-Divorce Application to Modify Custody

Supreme Court denied plaintiff father's post-divorce application seeking, among other things, modification of the parties' agreement concerning custody of their three children. The Appellate Division affirmed. There was a sound and substantial basis in the record for the court's determination that the father failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the children's best interests warranted modification of the existing custody arrangement. In any event, the record also supported the court's further determination that continuation of the existing custody arrangement served the best interests of the children. Each of the children expressed a preference to maintain the existing arrangement. While not controlling, the express wishes of the children were entitled to great weight, particularly where their age and maturity would make their input particularly meaningful. The record supported the court's determination that defendant mother had taken steps to address the children's school attendance problems, and there was no evidence that the mother's financial difficulties placed the children in jeopardy. Finally, the record did not support the father's contention that the court was biased in favor of the mother.

Gizzi v Gizzi, 136 AD3d 1405 (4th Dept 2016)

Mother Failed to Establish Child's Life Would Be Enhanced Economically, Emotionally and Educationally by Proposed Relocation

Family Court dismissed the mother' petition seeking permission to relocate with the parties' child to Florida. The Appellate Division affirmed. The court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) in determining that the mother failed to meet her burden of establishing by a preponderance of the evidence that the proposed relocation was in the child's best interests, and the court's determination had a sound and substantial basis in the record. The mother failed to establish that the child's life would be enhanced economically, emotionally and educationally by the proposed relocation. The mother failed to present any proof of her purported job offer and, moreover, she failed to establish that any employment she was offered in Florida would be anything more than temporary. The mother failed to offer any proof from which the court reasonably could conclude that the Florida school system was a significant improvement over the school system in New York. In addition, compared to the support the mother and child received by residing with the maternal grandmother in New York, the mother failed to establish that she and the child would receive similar support in Florida, where the nearest family member would be over an hour away. Respondent father had failed to fully avail himself of his visitation rights. Nevertheless, the mother lacked a feasible plan for preserving the relationship between the father and the child inasmuch as her proposed visitation arrangement upon relocation was unlikely to materialize given her uncertain employment and the lack of financial resources necessary to facilitate the child's transportation to New York.

Matter of Hirschman v McFadden, 137 AD3d 1612 (4th Dept 2016)

Referee Did Not Err in Denying Father's Oral Request that Matter be Heard By Family Court Judge

Family Court directed that respondent shall continue to have sole legal and physical custody of the subject child. The Appellate Division affirmed for the reasons stated in the decision at Family Court, and added that petitioner father's contention was rejected that the Court Attorney Referee did not have jurisdiction to hear and determine the matter. The parties and their attorneys signed a stipulation in 2012 setting forth that a judicial hearing officer or court attorney referee would hear and determine the custody matter and "all future modifications/ violation proceedings concerning this action." Thus, the Referee did not err in denying the father's oral request that the matter be heard by a Family Court judge.

Matter of Johnson v Prichard, 137 AD3d 1614 (4th Dept 2016)

Award of Custody to Petitioner Father Affirmed Where Family Court's Errors Were Harmless

Family Court awarded custody of the subject child to petitioner father. The Appellate Division affirmed. Although the court erred in referencing during its bench decision its own out-of-court observations of the mother, the error was harmless because the decision was fully supported by facts within the record. The court's decision properly set forth the grounds for its determination. A concerted effort by one parent to interfere with the other parent's contact with the child was so inimical to the best interests of the child as to, per se, raise a strong probability that the interfering parent was unfit to act as custodial parent. There was a sound and substantial basis in the record for the court's conclusion that the mother interfered with the father's relationship with the child by, among other things, denying the father access to the child. The court erred in admitting in evidence status update reports relating to the father's completion of a court-ordered drug and alcohol evaluation inasmuch as there was no indication that the records were certified to comply with CPLR 4518 pursuant to CPLR 3122-a. Nonetheless, the error was harmless.

Matter of Saletta v Vecere, 137 AD3d 1685 (4th Dept 2016)

Court's Error, If Any, in Admitting Evidence Was Harmless

Family Court modified the existing visitation arrangement by directing that respondent mother have supervised visitation with the parties' child, and dismissed her petition seeking a determination that petitioner father violated a prior order. The Appellate Division affirmed. The court did not err in admitting testimony concerning the child's out-of-court statements under the excited utterance exception to the hearsay rule. In any event, any error in admitting the statements was harmless, inasmuch as there was a sound and substantial basis in the record for the court's determination, without consideration of the statements, that it was not in the child's best interests to have unsupervised contact with the mother. The father established that the relationship

between the child and the mother had deteriorated significantly since the last order allowing the mother unsupervised visitation, to the point where the child no longer wanted to have visitation with the mother. Even assuming arguendo, that the court erred in admitting the mother's medical records, the court did not rely on the records in its decision, and there was a sound and substantial basis in the record for the court's determination to order supervised visitation.

Matter of Kirkpatrick v Kirkpatrick, 137 AD3d 1695 (4th Dept 2016)

Affirmance of Award of Sole Custody to Father

In the context of a divorce proceeding, Supreme Court entered an order that, among other things, granted custody of the parties' child to defendant father and dismissed the mother's family offense petition (appeal No. 1), and entered a further order that denied the mother's motion for leave to renew with respect to the prior order (appeal No. 2). The court also granted a judgment of divorce that awarded sole legal custody of the parties' child to the father (appeal No. 3). The Appellate Division dismissed the appeal from that part of the order in appeal No. 1 that awarded custody of the parties' child to the father, and also dismissed appeal No. 2, because the right of appeal from those orders terminated upon entry of the final judgment. The issues in those appeals were bought up for review on appeal from the final judgment in appeal No. 3. That part of the order in appeal No. 1 that dismissed the mother's family offense petition constituted the final resolution of that petition, and thus was properly before the Court. However, the mother's contention was rejected that Supreme Court erred in dismissing her family offense petition. The determination whether the father committed a family offense was a factual issue for the court to resolve, and the court's determination regarding the credibility of witnesses was entitled to great weight and would not be disturbed. In appeal No. 3, and the parts of all of the other appeals that were brought up for review on appeal from the final judgment, the mother's contention was rejected that the court erred in awarding custody of the parties' child to the father. The court's determination was supported by the evidence in the record, including that the mother placed the child in a home schooling program in order to permit the mother to relocate with the child in contravention of the court's prior orders, and that the mother was only home schooling the child a maximum of one day per week. In addition, there was no reason to overturn the court's determination not to credit the mother's version of the events underlying her claims of domestic violence and sexual abuse.

Cunningham v Cunningham, 137 AD3d 1704 (4th Dept 2016)

Court Abused Its Discretion in Denying Mother's Request That It Conduct Lincoln Hearing Before Ruling on Father's Motion to Dismiss

On respondent father's motion at the close of the mother's case, Family Court dismissed the mother's amended petition seeking to modify a prior order on the ground that the mother failed to establish a sufficient change in circumstances to warrant an inquiry into the best interests of the child. The Appellate Division reversed and remitted

for further proceedings and a new determination on the mother's amended petition. The court abused its discretion in denying the mother's request that it conduct a *Lincoln* hearing before ruling on the father's motion. Such a hearing could be conducted during or after fact-finding, and could be used to support an allegation of a change in circumstances. The decision whether to conduct such a hearing was discretionary, but it was often the preferable course to conduct one. The child was 14 year old at the time of trial and expressed a preference to live with the mother, the Attorney for the Child did not oppose a *Lincoln* hearing, and many of the changed circumstances alleged by the mother concerned matters within the personal knowledge of the child but not that of the mother or her witnesses. A *Lincoln* hearing would have provided the court with significant pieces of information it needed to make the soundest possible decision.

Matter of Noble v Brown, 137 AD3d 1714 (4th Dept 2016)

Court Properly Modified Judgment of Divorce By Awarding Father Primary Physical Residence and Awarding Mother Visitation

Family Court granted the father's petitioner seeking modification of the custody and visitation provisions of the parties' judgment of divorce. The Appellate Division affirmed. The mother's contention was rejected that the court erred in considering events predating the divorce judgment in determining whether there was a significant change in circumstances to warrant an inquiry into the best interests of the child. The parties' oral stipulation regarding custody was incorporated into the judgment of divorce nine months later. Where a party sought modification of a custody order entered upon the parties' stipulation, the party was required to demonstrate a change in circumstances from the date of the stipulation. The court properly concluded that there was a sufficient change in circumstances whether measured from the date of the oral stipulation or the date of the judgment of divorce. While the child's wishes were not dispositive, the Attorney for the Child advised the court of her client's strong preference to live with her father. In addition, the mother's efforts to undermine the father's relationship with the child and his participation in decisions concerning the child's welfare constituted a sufficient change in circumstances to warrant inquiry into the child's best interests. There was a sound and substantial basis in the record for the court's determination that it was in the child's best interests to award the father primary physical residence and to award visitation to the mother. Although the court found that both parents were fit and had the financial resources to support the child, the court determined that the mother's ability to foster the child's intellectual and emotional development was called into question by her lack of awareness of or concern for the child's declining performance in school. Most significantly, the court determined that the mother attempted to undermine the father's relationship with the child, while the father did not engage in such behavior.

Matter of Tuttle v Tuttle, 137 AD3d 1725 (4th Dept 2016)

Court Properly Modified Prior Consent Order By Directing that Respondent Mother Have Limited Supervised Visitation

In a proceeding pursuant to Family Court Act article 6, Supreme Court modified a prior consent order by directing that respondent mother have limited supervised visitation with the parties' child, and otherwise continued joint custody and primary physical residence with petitioner father. The Appellate Division affirmed. The mother did not challenge the determination that there was a significant change in circumstances, thus the only issue addressed by the Court was whether the custody and visitation determination was in the child's best interests. It was in the child's best interests that the father retain primary physical residence and the mother have limited supervised visitation. The mother admitted that she had been on probation following a conviction of endangering the welfare of a child for leaving the child unattended, that she smoked marihuana while on probation, and that she was arrested for possessing marihuana after the police responded to a disturbance that occurred when the mother went to the father's residence in violation of an order of protection. The mother also admitted that she pleaded guilty to harassment following a "road rage" incident that resulted in a physical altercation outside the vehicle while the child was in the back seat. In addition, the record established that the mother was unable to maintain a stable and safe home environment inasmuch as she moved frequently, and she resorted to heating an apartment with an open stove. Moreover, although the mother often volunteered in the child's preschool classroom and visited him during lunch, school staff members testified that the mother was disruptive and argumentative during some of the visits, and that there were instances of inappropriate treatment of the child. The record established that the father also engaged in various forms of improper conduct, often involving mistreatment of the mother. However, the mother's behavior consistently placed the child at risk, whereas the father provided a more stable home environment and was better able to provide for the child's emotional and intellectual development.

Matter of Brandon v King, 137 AD3d 1727 (4th Dept 2016)

Court Properly Granted Father Sole Custody and Mother Supervised Visitation, But Erred in Fashioning Schedule and Terms of Supervised Visitation

Family Court granted respondent father's cross petition by awarding him sole custody of the parties' children, with supervised visitation to petitioner mother. The Appellate Division modified and remitted. The court properly granted the father's cross petition. The father established the requisite change in circumstances. The mother's contention was rejected that the court's evidentiary rulings with respect to the audio recordings made by a police detective contemporaneously with his investigation of allegations of a sexual assault against one of the children violated her Sixth Amendment Confrontation Clause and Due Process rights under the New York and United States Constitutions. Family Court matters are civil in nature, and the Confrontation Clause applies only to criminal matters. Although the mother failed to preserve for review her contentions that the court erred in admitting hearsay evidence in the form of a detective's audio recording containing, among other things, statements by the mother, in any event, that contention was without merit. The court erred in admitting the audio recording of the confession of the perpetrator of a sexual assault against one of the children. However, the error was harmless. The requirement that visitation be supervised was supported

by a sound and substantial basis in the record. The mother obstructed law enforcement efforts to investigate a sexual assault against one of the children, attempted to sabotage the father's relationship with the children, and placed her own needs above those of the children. The contention of the mother and the Attorney for the Children was accepted that the provisions of the order limiting the mother's visitation to supervised telephone access one day per week for a maximum of 20 minutes, and to a minimum of three hours of supervised visitation per month was unduly restrictive and thus not in the best interests of the children. Therefore, the order was modified by vacating the visitation schedule and the matter was remitted to determine a more appropriate supervised visitation schedule. In addition, the court improperly delegated its authority to the father to determine the location of the supervised visitation, the person or persons to supervise the mother's visitation, and whether any additional family members could attend visitation with the mother. The order was further modified by vacating those provisions, and remitted for the additional purpose of determining the location of supervised visitation, the supervisor or supervisors of the visitation, and whether additional family members, if any, could accompany the mother to visitation.

Matter of Guillermo v Agramonte, 138 AD3d 1767 (4th Dept 2016)

Father's Challenge to Court's Determination With Respect to Extraordinary Circumstances Not Moot

Family Court granted custody of the subject child to petitioner stepmother, with supervised visitation to the father. The Appellate Division dismissed the appeal insofar as it concerned visitation, and reversed and dismissed the petition. The appeal was not mooted in its entirety by the subsequent entry of an order upon agreement of the parties regarding custody and visitation. The court erred in finding the existence of extraordinary circumstances to warrant consideration of the best interests of the child. As between a parent and a nonparent, the parent had a superior right to custody that could not be denied unless the nonparent established that the parent had relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances. Once the preferred status of the birth parent under *Matter of Bennett v Jeffreys*, 40 NY2d 543, had been lost by a judicial determination of extraordinary circumstances, that issue could not be revisited in a subsequent proceeding seeking to modify custody. Thus, such a finding could have enduring consequences for the parties.

Matter of Green v Green, 139 AD3d 1384 (4th Dept 2016)

Petitioner Not Required to Prove Substantial Change in Circumstances

Family Court awarded petitioner father sole custody of the subject child. The Appellate Division affirmed. The proceeding involved an initial court determination with respect to custody and, although the parties' informal arrangement was a factor to be considered, the father was not required to prove a substantial change in circumstances in order to

warrant a modification thereof. The court's determination that the best interests of the child would be best served by awarding custody to the father had a sound and substantial basis in the record. The court did not abuse its discretion in denying respondent mother's motion pursuant to CPLR 4404 (b) and 5015 (a) to vacate the order appealed from.

Matter of Walker v Carroll, 140 AD3d 1669 (4th Dept 2016)

Court's Findings Demonstrated That It Made a Best Interests Determination

Family Court granted the mother's petition in part and modified a prior order of custody by requiring that the father's visitation with the subject children be supervised. Although the court did not state that it was in the best interests of the children to modify the prior order of custody, the court's findings demonstrated that it made such a determination. The court's determination that unsupervised visitation would be detrimental to the children had a sound and substantial basis in the record.

Matter of Grant v Habalou, 140 AD3d 1677 (4th Dept 2016)

Family Court Did Not Abuse Its Discretion in Granting Motion to Dismiss Father's Petition to Modify Visitation

The father, who was serving a term of imprisonment, filed a petition seeking to modify a prior court order permitting him to communicate with the parties' daughter by letter. Family Court dismissed the petition. The Appellate Division affirmed. Family Court did not abuse its discretion in granting the mother's motion to dismiss the petition without first conducting a hearing. To survive a motion to dismiss, a petition seeking to modify a prior order of visitation was required to contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child. The petition contained only the father's speculation that the mother had interfered with the child's ability to communicate with him. The record established that the AFC presented the child's position to the court, i.e, that she wanted to hear from the father on occasion but did not want any other contact. The father's further contention was rejected that the mother's failure to inform him of the child's well-being constituted a change in circumstances, inasmuch as the mother was not required to do so.

Matter of Nicholson v Nicholson, 140 AD3d 1689 (4th Dept 2016)

Court Properly Admitted Into Evidence Audio Recordings and Sworn Statement Given to Police

Family Court awarded sole custody of the parties' child to petitioner father. The Appellate Division affirmed. The mother's contention was unpreserved for review that the court erred in admitting in evidence at the custody hearing an audio recording of a telephone conversation between the parties that the father secretly recorded. Although the mother's counsel initially objected to the recording being admitted, counsel withdrew

the objection after the court adjourned the matter so that counsel could research the issue. The mother also failed to preserve her further contention that the court erred in admitting in evidence an audio recording of a telephone call the father made to 911, during which the father told the 911 dispatcher that the mother was trying to take the child without his permission. When the father's counsel offered the recording in evidence, the mother's counsel stated, "I have no objection, Your Honor." The Attorney for the Child also had no objection to the second audio recording. Accordingly, the court properly admitted both recordings. The mother's further contention was rejected that the court erred in admitting in evidence a sworn statement given to the police by her adult daughter concerning an incident that occurred between the parties at the daughter's house. Although the mother correctly conceded that the daughter's testimony at the hearing was inconsistent with parts of her sworn statement, she contended that the statement should not have been admitted because the daughter acknowledged that she gave the statement to the police and testified that everything in the statement was true. Even assuming, arguendo, that the court erred in admitting the written statement, such error was harmless considering that the inconsistent statements were explored by the father's counsel during his cross-examination of the daughter, and the evidence was not particularly prejudicial to the mother. Moreover, there was ample other evidence in the record supporting the court's custody determination.

Matter of Clark v Hawkins, 140 AD3d 1753 (4th Dept 2016)

Order Modified to Conform to Decision

In a memorandum decision, Family Court dismissed the mother's two modification petitions. The court's order, however, referenced only the dismissal of the second petition. The Appellate Division modified by granting respondent father's motion and dismissing the first petition. Where there was a conflict between the decision and the order, the decision controlled, and the order was modified to conform to the decision. The mother did not address the second petition on appeal. Thus, she had abandoned any contentions related thereto. The court properly granted the father's motion to dismiss the first petition without a hearing. The mother failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing.

Matter of Esposito v Magill, 140 AD3d 1772 (4th Dept 2016)

Mother's Interference With Father's Visitation Sufficient to Establish Requisite Change in Circumstances; Placement in Primary Physical Custody of Father in Best Interests of Two Youngest Children

Family Court denied respondent father's cross petition for modification of a prior consent order and ordered that the parties' five minor children remain in the sole custody of petitioner mother. The Appellate Division modified by awarding primary physical custody of the two youngest children to the father, with visitation to the mother, and remitted to fashion an appropriate visitation schedule for those children and to determine the best interests of the second and third eldest children. The court erred in

determining that the father did not meet his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a change in custody was in the best interests of the children. The evidence that the mother was interfering with the father's visitation with the children was sufficient to establish the requisite change in circumstances. Further, it was in the best interests of the two youngest children to be placed in the primary physical custody of the father. The mother's acts of hostility toward the father included instructing the children to be uncooperative and disrespectful when in the father's care, and to refuse to recognize him as their father. Additionally, on multiple occasions, the mother refused to allow the children to leave for the father's visitation until the father called the police. The mother also made derogatory comments about the father and his wife in front of the children, and refused to communicate with the father about the children, even failing to inform the father that one of the children underwent surgery for appendicitis. The AFC for the three older children informed the Court at oral argument that, in a subsequent proceeding commenced after the appeal was perfected, the court awarded the father temporary custody of the second and third eldest children. The eldest child remained with the mother and would be 18 years old in July. The Court took notice of new facts to the extent they indicated that the record before it was no longer sufficient for determining the best interests of the second and third eldest children.

Matter of Amrane v Belkhir, 141 AD3d 1074 (4th Dept 2016)

Court Properly Allowed Father to Take Child to Montana During Summer Visitation; Issue Raised by AFC Beyond Appellate Review

Family Court modified a prior custody order by allowing petitioner father to take the child to a family reunion in Montana during his summer visitation. The Appellate Division affirmed. The issue raised by the Attorney for the Child (AFC), i.e., that the father failed to establish a change in circumstances, was beyond appellate review, inasmuch as the AFC did not file a notice of appeal. Although respondent mother appeared to have adopted the AFC's contention, that issue was not properly before the Court because it was raised for the first time in the mother's reply brief. There was a sound and substantial basis in the record for the court's determination that the child would benefit from visiting her relatives in Montana, and the court did not abuse its discretion in allowing the father to take her there during his summer visitation.

Matter of Carroll v Chugg, 141 AD3d 1106 (4th Dept 2016)

Court Erred in Granting Mother's Motion to Dismiss Father's Custody Modification Application With Prejudice at Close of His Proof

Defendant father sought, by order to show cause, to modify the judgment of divorce, which incorporated but did not merge the parties' agreement providing for joint custody of their two children, with physical placement with the father and extensive visitation with plaintiff mother. Supreme Court granted the father temporary custody of the parties' children, with supervised visitation to plaintiff mother, and referred the matter to

a judicial hearing officer (JHO) to hear and determine, among other things, the father's application to modify the judgment of divorce. The JHO granted the mother's motion to dismiss the father's application with prejudice at the close of his proof, and the court thereafter vacated the temporary order and "fully restored" the provisions of the prior agreement as incorporated but not merged in the judgment of divorce. The Appellate Division granted the motion of the AFC to stay the order pending appeal, reversed, reinstated defendant's application and the temporary order, and remitted for further proceedings. Accepting the father's proof as true, the father established, among other things, that the older child called 911 at the mother's suggestion, allegedly because he did not want to go to the father's house, and was taken by emergency personnel for a mental health assessment and released to the father's custody. In addition, the mother told a neighbor on several occasions that the father had physically and/or sexually abused the children; the mother discussed the court proceedings with the children; and the court-appointed psychologist determined that the mother's mental health issues affected her ability to co-parent and that the stress caused by the older child's behavior affected the mother's ability to parent the children effectively. Accordingly, the father met his burden of demonstrating a sufficient change in circumstances to require consideration of the welfare of the children. Moreover, the JHO erred in refusing to admit in evidence the report of the court-appointed psychologist on the ground that the report was not the "best evidence" because the psychologist was available to testify. The oft-mentioned and much misunderstood best evidence rule simply required the production of an original writing where its contents were in dispute and were sought to be proven. Thus, that rule was not applicable. The contention of the AFC was rejected that the court erred in requiring the admission in evidence of three cellular telephones as the best evidence of the content of text messages between, among other things, the parties, particularly in view of the father's failure to offer in evidence an authenticated copy-and-paste document of the text message conversations.

Miller v Miller, 141 AD3d 1117 (4th Dept 2016)

Dismissal of Father's Visitation Petition Reversed

Family Court granted the motion of respondent mother to dismiss the father's petition. The Appellate Division reversed and reinstated the petition. The court erred in summarily dismissing the father's petition to expand his visitation with the child from 10 hours each week to one overnight visit every two weeks. The father adequately alleged a change in circumstances warranting a modification of the existing consent order with respect to visitation in the best interests of the child inasmuch as the mother had, since the parties' agreement to the consent order, repeatedly reneged on her promises, made before and since the agreement to the consent order, to allow the father to have overnight visitation with the child.

Matter of Machado v Tanoury, 142 AD3d 1322 (4th Dept 2016)

Petitioner Non-Parents Established Extraordinary Circumstances

Family Court awarded custody of respondent father's eldest child to petitioner Roseman and custody of respondent's other two children to petitioner Carroll. The Appellate Division modified by vacating that part of the order determining respondent's visitation and remitted. The record supported the court's determination that petitioners met their burden of establishing extraordinary circumstances. They presented evidence of the father's long and serious history of alcohol abuse and the highly unstable and unsafe living conditions the abuse created for the children. The evidence also showed that the father failed to attend to the medical needs of the two youngest daughters. There was a sound and substantial basis in the record for the court's determination that the best interests of the children was served by the respective awards of custody to petitioners. The court properly refused to recuse itself inasmuch as the record did not show that the court was biased against the father. The father received effective assistance of counsel. The court erred, however, in denying contact of any kind with the father's eldest daughter. While the evidence established that the father's relationship with the daughter was strained, it did not establish that visitation would be detrimental to her welfare. The court also erred in limiting the contact with his two other daughters via Skype, supervised by Carroll, because the record failed to establish that visitation with the father would harm them. Thus, the case was remitted for a determination of visitation with each of the children. The court also erred in suspending the father's visitation until he, among other things, completed a drug and alcohol evaluation and all recommended treatment. Thus, that part of the order was vacated.

Matter of Roseman v Sierant, 142 AD3d 1323 (4th Dept 2016)

Determination of Sole Custody to Father, Supervised Visitation With Mother Affirmed

Family Court granted custody of the subject child to respondent father and supervised visitation to petitioner mother. The Appellate Division affirmed. The mother's contention that the court erred in ruling that the mother was estopped from contending that respondent was not the biological father of the child was rejected. The estoppel issue was decided in respondent's favor by an order that was affirmed on a prior appeal. The court did not err in awarding the father custody of the subject child. The record established that the court's determination was the product of a careful weighing of the appropriate factors and that it had a sound and substantial basis in the record. The court's determination to impose supervised visitation was also supported by a sound and substantial basis in the record, especially considering the mother's continued attempts to undermine the father's ability to maintain a relationship with the child.

Matter of Joyce S. v Robert W.S. 142 AD3d 1343 (4th Dept 2016)

Grandmother Established Extraordinary Circumstances

Family Court granted sole custody of the subject child to petitioner grandmother. The Appellate Division affirmed. The court properly determined that the grandmother met her burden of proving extraordinary circumstances and that she therefore had standing

to seek custody of the child. The court, upon carefully weighing the appropriate factors, properly determined that modifying the prior order by awarding the grandmother sole custody and primary physical residence was in the best interests of the child. The court did not improperly delegate its authority to schedule visitation between the child and mother to the grandmother. If the mother was unable to obtain "access with the child as the parties can agree and arrange" pursuant to the court's order, the mother could file a petition seeking to enforce or modify the order.

Matter of Thomas v Small, 142 AD3d 1345 (4th Dept 2016)

Deterioration of Parties' Relationship Constituted Changed Circumstances

Supreme Court modified the parties' Separation and Property Settlement and "Opting Out" Agreement, by awarding sole custody of the parties' child to defendant father with visitation to plaintiff mother. The Appellate Division affirmed. The record supported the court's determination that the continued deterioration of the parties' relationship and their inability to co-parent constituted a change in circumstances. The court's decision properly set forth the grounds for its determination. The record supported the court's conclusion that the mother interfered with the father's relationship with the child and that the mother's unfounded allegations of domestic violence against the father, some of which were made in the presence of the child, rendered her unfit to be a custodial parent. The court's delay in making a determination was unreasonable, but reversal or remittal was not required inasmuch as the court's decision was supported by the record.

Werner v Kenney, 142 AD3d 1351 (4th Dept 2016)

Court Erred in Denying Mother's Request For an Adjournment

Supreme Court awarded primary physical custody of the parties' child to plaintiff father. The Appellate Division reversed and remitted for a new custody hearing. On the morning of trial defendant mother's counsel withdrew from representation for nonpayment of legal fees and defendant requested an adjournment to obtain new counsel and the testimony of witnesses. The court denied the request and defendant was forced to proceed pro se. The court abused its discretion in denying the adjournment. The record established that the request was not a delay tactic and did not result from defendant's lack of diligence. The court's refusal to grant the adjournment to obtain new counsel resulted in the absence of a full and complete record upon which the court could render a n adequate and informed decision.

Zhu v Cheng, 142 AD3d 1365 (4th Dept 2016)

Mother's Contention AFC Was Biased Without Merit

Family Court modified a prior consent order by awarding respondent father primary physical custody of the parties' child with visitation to petitioner mother. The Appellate Division affirmed. The father met his burden of establishing changed circumstances and

there was a sound and substantial basis in the record to support the determination that it was in the child's best interests to award the father primary residential custody. The mother's contentions that the AFC was biased against her and failed to provide meaningful representation and act in the child's best interests were not preserved for review and, in any event, were without merit. The mother was provided with meaningful representation.

Matter of Elniski v Junker, 142 AD3d 1392 (4th Dept 2016)

Mother Alienated Children From Father

Family Court awarded petitioner father sole custody of the parties' children and supervised visitation with respondent mother. The Appellate Division affirmed. The court made sufficient findings of fact and its determination had a sound and substantial basis in the record. The evidence established that the mother was alienating the children from the father. She made it apparent during her testimony that she did not want the children to have a relationship with the father. She denied or obstructed the father's visitation with the children and would not cooperate with the visitation supervisors. The court's order did not require the mother to complete a parenting program and comply with mental health counseling as a prerequisite to filing a petition for modification of custody or visitation. The order stated that the mother's completion of such a program and compliance with mental health counseling as ordered by the court would constitute a substantial change in circumstances for any future modification petition. The court properly ordered the mother to attend mental health counseling as part of its order granting her visitation.

Matter of Cramer v Cramer, 143 AD3d 1264 (4th Dept 2016)

Petition Properly Dismissed Without Hearing

Family Court granted respondent father's motion to dismiss the mother's petition to modify a prior order that granted the father sole legal and physical custody of the parties' daughter. The Appellate Division affirmed. The court did not err in deciding the father's motion on the same day it was filed and served. The mother was not prejudiced by the timing of the father's motion. The contention of the mother and the AFC that the court erred in dismissing the petition without a hearing was rejected. The mother failed to make a sufficient evidentiary showing of a change of circumstances to require a hearing.

Matter of Noble v Paris, 143 AD3d 1288 (4th Dept 2016)

Court Erred in Ordering Counseling as a Prerequisite to Mother's Visitation

Family Court awarded respondent father sole custody of the parties' children. The Appellate Division modified by striking the provision in the order requiring petitioner mother to participate in counseling as a prerequisite for seeking visitation. The court

erred in requiring the mother to actively engage in individual counseling before seeking visitation with the children. A court may include a directive to obtain counseling as a component of a custody or visitation order, but does not have the authority to order such counseling as a prerequisite to custody or visitation. The mother failed to demonstrate that she was denied effective assistance of counsel.

Matter of Mickle v Mickle, 143 AD3d 1289 (4th Dept 2016)

Court Properly Denied Grandmother's Custody Petition

Family Court, among other things, denied the subject child's grandmother's petition for custody of the child. The Appellate Division affirmed. Assuming, arguendo, that petitioner County Department of Health and Human Services (DHS) failed to fulfill its statutory duty to locate the subject child's relatives and inform them of the pendency of the TPR proceeding with respect to the child's father, the provisions of article 10 has an explicit best interests standard of review for review of petitions seeking placement of a child with a relative. On the father's prior appeal, his contention that the child's best interests would have been served by awarding custody of the child to petitioner, rather than the DHS so the child could be adopted by her foster parents, was rejected. For the reasons stated on the father's appeal, petitioner's contention that the best interests of the child would be served by awarding custody to her was rejected. The mother failed to demonstrate that she was denied effective assistance of counsel because her attorney failed to move to vacate a prior order of placement at the same time the attorney filed the instant petition for custody. Because the court properly determined that the best interests of the child were served by awarding custody to DHS, there was little or no chance that such motion would have been successful.

Matter of Lundyn S., 144 AD3d 1511 (4th Dept 2016)

Mother's Allegations of DV Not Proved

Family Court awarded respondent father primary physical custody of the parties' children with visitation to petitioner mother, and granted the mother secondary decision-making authority regarding the children's health, education and welfare. The Appellate Division affirmed. The mother's contention that the court did not give proper consideration to her allegations of domestic violence and its alleged negative impact on the children, was rejected because the allegations were not proven by a preponderance of the evidence. The court did not err in granting primary physical custody to the father, even though the grandmother cared for the children while the father worked. The record supported the determination that the father assumed greater responsibility for the children's care since the parties separated and that the children benefitted from the care they received from the grandparents. The record also supported the determination that the father's work schedule at his family-owned business could be altered to care for the children as needed.

Matter of Chyreck v Swift, 144 AD3d 1517 (4th Dept 2016)

Mother's Objection to Reappointment of AFC Properly Denied

Family Court granted sole custody of the subject children to petitioner father. The Appellate Division affirmed. The court properly dismissed the mother's cross petition seeking custody because she failed to show a change in circumstances. The court's determination to grant in part the father's petition and to modify visitation had a sound and substantial basis in the record. The mother's objection to reappointment of the AFC was properly denied. Contrary to the mother's contention, there was no support in the record that the AFC was biased against the mother and, therefore, there was no reason for the court to appoint a new AFC.

Matter of Trombley v Payne, 144 AD3d 1551 (4th Dept 2016)

Grandmother Established Extraordinary Circumstances

Family Court granted custody of the subject children to petitioner grandmother, with supervised visitation to the mother. The Appellate Division affirmed. The grandmother met her burden of proving extraordinary circumstances. The record established that the mother suffered from ongoing and chronic mental health issues that she failed to address adequately. The mother also had a history of alcohol abuse and a history of persistently neglecting the children's health and well being. The evidence also established that the mother's issues resulted in an unfortunate and involuntary disruption of custody over an extended period of time.

Matter of Thomas v Armstrong, 144 AD3d 1567 (4th Dept 2016)

Court Properly Dismissed Father's Petition Seeking Visitation With Children

Family Court dismissed the father's petition seeking visitation with his children and imposed two conditions precedent to any attempt by the father to file another petition. The Appellate Division modified by vacating that part of the order imposing conditions precedent. The court did not err in granting the AFC's motion to dismiss the petition. At the time the petition was filed, respondent was incarcerated in Michigan, and he admitted he had 10 more years of incarceration before he would be released. Before he was incarcerated, the children were removed from his care while a neglect proceeding was commenced against him. Respondent admitted that he had engaged in appropriate behavior with the children's half-sister, and an order of protection preventing communication between respondent and the children expired in February 2012. Even after the order of protection expired, respondent had little or no contact from the children. Thus, despite the presumption in favor of visitation, an evidentiary hearing was not required because the court possessed sufficient information to render an informed determination consistent with the children's best interests. Respondent's constitutional rights were not violated because he was not present at the proceedings inasmuch as he was represented by an attorney who participated in the proceedings. The court attempted to secure respondent's presence electronically at court appearances, but on one occasion was unable to do so when prison officials failed to

answer any of the four calls placed by the court to the facility. Respondent was provided meaningful and competent representation.

Matter of Otrosinka v Hageman, 144 AD3d 1609 (4th Dept 2016)

Aunt and Uncle Established Extraordinary Circumstances

Family Court granted custody of the subject children to the children's aunt and uncle. The Appellate Division affirmed. Respondent mother violated an order of protection directing her not to allow respondent father to have unsupervised contact with the children by allowing such conduct on numerous occasions. The court properly found that there were extraordinary circumstances justifying an inquiry whether the aunt and uncle could obtain custody of the children as against the mother, and it properly determined that it was in the children's best interests to be placed with the aunt and uncle.

Matter of Tristyn R., 144 AD3d 1611 (4th Dept 2016)

Court Properly Denied Respondent's Motion For Recusal

Family Court modified a prior order by requiring respondent's visitation with the children to be supervised. The Appellate Division dismissed the appeal, with the exception of respondent's challenge to the denial of his motion for recusal, which was affirmed. The record established that during the hearing on the mother's petition, the father discharged his assigned counsel, advised the court that he was proceeding pro se, and failed to appeal for the remainder of the hearing. Thus, because the order was entered upon default, no appeal lay. Even assuming, arguendo, that the order was not entered upon the father's default, the court did not err in modifying the prior order of visitation inasmuch as the court' determination was supported by a sound and substantial basis in the record. The father's contention that the court should have recused itself was without merit. The court did not abuse its discretion in denying the father's motion for recusal because he failed to set forth any evidence of bias or prejudice on the part of the court.

Matter of Rottenberg v Clarke, 144 AD3d 1627 (4th Dept 2016)

Sound and Substantial Basis For Court's Award of Custody to Father

Family Court awarded the parties joint custody of the subject child with primary physical residence with respondent father. The Appellate Division affirmed. There was a sound and substantial basis in the record for the court's determination that awarding the father primary physical residence of the child was in the child's best interests. Although the court found that both parents were fit and that the mother had been the child's caretaker since birth, the record supported the court's determination that the father had the financial resources to support the child, had a stable residence with a room for the

child, and had the convincing edge in fostering a relationship between the child and mother.

Matter of Honsberger v Honsberger, 144 AD3d 1680 (4th Dept 2016)

Sole Custody of Child to Father Affirmed; Mother Neglected Child

Family Court awarded petitioner father sole custody of the subject child. The Appellate Division affirmed. Although the court failed to articulate specific findings to support its conclusion that there had been a change in circumstances, the finding that respondent mother neglected the child based upon the conditions in her home, constituted a change in circumstances that warranted a determination whether the joint custody arrangement was in the child's best interests. The child's best interests were served by awarding the father sole custody. Although ordinarily sibling relationships should not be disturbed, that rule was not absolute and here the court properly concluded that it was in the child's best interests that she be separated from her siblings.

Matter of Curry v Reese, 145 AD3d 1475 (4th Dept 2016)

Request For Visitation With Child at Correctional Facility Properly Denied

Family Court denied the father's petition for visitation with the child at the correctional facility where he was incarcerated. The Appellate Division affirmed. It was generally presumed to be in a child's best interests to have visitation with his or her noncustodial parent, and the fact that a parent was incarcerated would not, by itself, render visitation inappropriate. Nevertheless, where, as here, domestic violence was alleged, the Referee must consider the effect of such domestic violence upon the best interests of the child. Furthermore, petitioner presented no plan to accomplish the requested visitation, and the record established that none of his friends or family members offered to facilitate transportation of the child. The record supported the Referee's determination that respondent did not have a driver's license or the financial resources to provide transportation for the child. The denial was not premised merely on an arbitrary opposition to visitation or its cost and inconvenience but, rather, on the unavailability of any appropriate arrangement to accomplish physical visitation under the circumstances.

Matter of Smith v Stewart, 145 AD3d 1534 (4th Dept 2016)

Reversal of Order Continuing Physical Residency of Subject Child With Paternal Grandmother

Family Court directed that the subject child shall continue to reside with respondent paternal grandmother. The Appellate Division reversed, reinstated the petitions, and remitted. The court erred in failing to make a determination whether extraordinary circumstances existed to warrant an inquiry into the best interests of the child. As between a parent and a nonparent, the parent had a superior right to custody that could

not be denied unless the nonparent established that the parent had relinquished that right because of surrender, abandonment, persistent neglect, unfitness or other like extraordinary circumstances. The nonparent had the burden of proving that extraordinary circumstances existed, and until such circumstances were shown, the court could not reach the issue of the best interests of the child. The foregoing rule applied even if there was an existing order of custody concerning a child, unless there was a prior determination that extraordinary circumstances existed. There was no indication in the record that, in the history of the parties' litigation, the court previously made a determination of extraordinary circumstances divesting the mother of her superior right to custody. Because the hearing transcript, which was transcribed from an audio recording, was riddled with unintelligible gaps in the testimony, the record was insufficient for the Court to make its own determination with respect to whether extraordinary circumstances exist.

Matter of Wolfford v Stephens, 145 AD3d 1569 (4th Dept 2016)

Affirmance of Order Modifying Custody by Granting Father Primary Physical Residency

Family Court continued joint parental custody of the parties' child, but changed the primary residential parent from respondent mother to petitioner father. The Appellate Division affirmed. A change in circumstances was shown to have occurred since the entry of the prior order, specifically, the mother's refusal to abide by her prior agreement with the father that the child would, beginning with the seventh grade, attend school in the district in which the father resided. There was a sound and substantial basis in the record for the determination that it was in the child's best interests to change her primary physical residence from the mother's house to the father's house in connection with that long-anticipated change of schools.

Matter of Stevenson v Smith, 145 AD3d 1598 (4th Dept 2016)

Sole Custody of Child to Father Reversed

Family Court awarded plaintiff father sole custody of the subject children. The Appellate Division reversed and remitted the matter to the Supreme Court for further proceedings on the issue of custody. Defendant appealed from the order of Family Court granting the father's petition for sole custody of the parties' children. Because the order was incorporated but not merged in Supreme Court's subsequent judgment of divorce, the Appellate Division treated the appeal as having been taken from the final judgment of divorce. Family Court erred in granting the father's petition in the absence of a hearing to determine the best interests of the children without articulating which factors were material to its determination and the evidence supporting its decision.

Matter of King v King, 145 AD3d 1613 (4th Dept 2016)

Primary Physical Placement to Father Affirmed

Family Court awarded the parties joint custody of the subject child, with primary physical placement to respondent father and visitation to petitioner mother. The Appellate Division affirmed. The fact that the mother was the child's primary caretaker prior to the parties' separation was not determinative, and the record established that the child was comfortable in both homes and had strong relationships with members of her extended family who lived with the father, i.e., her paternal grandparents and a cousin who was born the same year as the subject child. In addition, the evidence showed that, when the parties separated, the mother moved with the child more than an hour away from the father's home, and denied the father access to the child for over a month. Therefore, the record supported the court's finding that the father was the more willing of the parties to foster the other parent's relationship with the child. The mother's contention was rejected that the award of primary physical placement to the father was in effect an award of custody to the paternal grandmother. Although the father worked as a truck driver and had a demanding schedule, the record established that he returned home each day, usually by 5:30 p.m., and that he took cake of the child himself whenever he was at home, thereby demonstrating that he was an active and capable parent notwithstanding his work schedule.

Matter of Owens v Pound, 145 AD3d 1643 (4th Dept 2016)

No Abuse of Discretion in Denying Motion to Vacate Order Entered Upon Default

Family Court denied respondent father's motion to vacate an order, entered upon his default, that awarded petitioner mother sole custody of the parties' children and ended the father's visitation with the children. The Appellate Division affirmed. The record established that the notice Family Court mailed to the father was not returned, and that the father had actual knowledge of the hearing. The court did not abuse its discretion in denying the father's motion inasmuch as he failed to offer either a reasonable excuse for this default or a meritorious defense. The father's remaining contentions were not properly before the Court in that no appeal could be taken from an order entered on default.

Matter of Neupert v Neupert, 145 AD3d 1643 (4th Dept 2016)

No Abuse of Discretion in Denying Father's Request for Adjournment and Proceeding With Hearing in His Absence

Family Court awarded petitioner mother sole custody of the subject children and respondent father supervised visitation. The Appellate Division affirmed. The father's contention was rejected that Family Court abused its discretion in denying his request to adjourn the evidentiary hearing. The grant or denial of a motion for an adjournment for any purpose was a matter resting within the sound discretion of the trial court. The father had not appeared at the pretrial conference or the date scheduled for a hearing. The medical excuse that the father sent to the court was vague and failed to show why he was unable to attend the hearing. Therefore, the court did not abuse its discretion in

denying the father's request for an adjournment and proceeding with the hearing in his absence.

Matter of Biles v Biles, 145 AD3d 1650 (4th Dept 2016)

FAMILY OFFENSE

Father's Family Offense Petition and Violation Petition Reinstated; Order of Protection Granted in Favor of Mother Reversed

In the first of two orders on appeal, Family Court dismissed respondent father's family offense petition, and denied, without making any findings of fact, his violation petition. In the second order on appeal, the court entered an order of protection directing the father to refrain from, among other things, harassing petitioner mother, his former wife. The Appellate Division modified the first order by reinstating the family offense petition and the violation petition of the father, and remitted the matter for further proceedings. The record established that the father testified to conduct by the mother that could support a determination that she committed a family offense. Given the conflicting versions of the same events offered by the parties at the hearing, the credibility of the parties as witnesses would be crucial to the resolution of the father's family offense petition. With respect to the denial of the father's violation petition, the court failed to set forth those facts essential to its decision. In the second appeal, the Court reversed the order of protection and dismissed the mother's petition. The court failed to specify the particular family offense under Family Court Act Section 812 (1) that the father allegedly committed. Nonetheless, remittal was not necessary because the record was sufficient for the Court to conduct an independent review of the evidence. The evidence was not legally sufficient to support a finding by a fair preponderance of the evidence that the father committed any of the enumerated family offenses upon which an order of protection could be predicated.

Matter of Langdon v Langdon, 136 AD3d 1580 (4th Dept 2016)

Mother's Family Offense Petition Reinstated

In the first order on appeal, Family Court dismissed the mother's family offense petition against respondent father. In additional orders on appeal, Family Court denied the mother's petitions seeking custody of the subject children, and granted the father's petitions to modify a prior order by directing that the mother's visitation be supervised. With regard to the appeal from the custody and visitation orders, the Appellate Division affirmed. The father established a sufficient change in circumstances to warrant inquiry into whether the prior order should be modified, and the Judicial Hearing Officer's determination that it was in the children's best interests to impose supervised visitation was supported by a sound and substantial basis in the record. The evidence established, among other things, that the mother's mental health issues resulted in several incidents of erratic behavior that negatively affected the children and jeopardized their well-being, and that the mother failed to adequately address those issues. With respect to the appeal from the dismissal of the mother's family offense petition, the Appellate Division reversed, reinstated the petition and remitted the matter. The court erred in adopting the JHO's report to dismiss the petition without providing the parties with notice of the filing of the report and affording them an opportunity to object to it. The record established that the JHO was authorized only to hear the matter

and issue a report inasmuch as the mother did not consent to the referral to the JHO for a final determination on her petition.

Matter of Gibson v Murtaugh, 137 AD3d 1574 (4th Dept 2016)

Order of Protection Reversed Where Evidence of Intent Legally Insufficient

Family Court issued an order of protection upon a finding that respondent committed a family offense by engaging in conduct that would constitute the offense of harassment in the second degree. The Appellate Division reversed and dismissed the petition. The evidence of intent was legally insufficient, thus, petitioner did not meet her burden of establishing by a fair preponderance of the evidence that respondent's conduct constituted the alleged offense. The Referee found that respondent committed the family offense based upon the Referee's conclusion that respondent told petitioner during a lengthy telephone call that he did not know what he would do if he saw her with another man, sent her two or three text messages stating that he hoped to reconcile with her, and then left on petitioner's car several mementos that petitioner had given him along with the message that he would "never forget [her], bye." Notwithstanding the Referee's implicit finding that petitioner was upset by the communications, her reaction was immaterial in establishing respondent's intent. Furthermore, although the requisite intent could be inferred from the surrounding circumstances, the circumstances failed to establish that respondent acted with the requisite intent. Such conduct was comprised of relatively innocuous acts that were insufficient to establish that respondent engaged in a course of conduct with the intent to harass, alarm or annoy petitioner.

Matter of Shephard v Ray, 137 AD3d 1715 (4th Dept 2016)

Order of Protection Affirmed; Decision that Respondent Committed Other Family Offenses Vacated

After a fact-finding hearing, and upon a related decision, made after the hearing, Family Court issued an order of protection upon a finding that respondent committed family offenses against petitioner. The Appellate Division affirmed the order of protection and vacated the underlying decision that respondent committed the family offenses of harassment in the first degree and aggravated harassment in the second degree. The evidence was legally insufficient to establish that respondent committed the family offense of harassment in the first degree. Petitioner did not sustain her burden of establishing by a preponderance of the evidence that respondent intentionally and repeatedly harassed another person by following such person in or about a public place or places; therefore, the finding was vacated. The finding that respondent committed the family offense of aggravated harassment in the second degree was also vacated insofar as that finding was premised on former subdivision (1) of Penal Law Section 240.30, inasmuch as the Court of Appeals has declared that Penal Law Section 240.30 (1), as it existed at the time of the decision on the petition, was unconstitutionally vague and overbroad. However, the proof was legally sufficient to establish that respondent

committed the family offense of aggravated harassment in the second degree as defined in former subdivision (2) of Penal Law Section 240.30. Petitioner testified that, after she ended their relationship and asked respondent to cease communicating with her, respondent called her, sent her text messages, and left her voicemail messages in an excessive manner. She further testified that respondent threatened her and was verbally abusive during certain telephone calls.

Matter of Whitney v Judge, 138 AD3d 1381 (4th Dept 2016)

Order of Protection Affirmed; Finding in Underlying Order Vacated that Respondent Committed the Family Offense of Stalking in Fourth Degree

Family Court issued an order of protection upon a determination that respondent committed acts constituting the family offenses of disorderly conduct and stalking in the fourth degree against petitioner. The Appellate Division affirmed the order of protection and vacated the underlying order that respondent committed the family offense of stalking in the fourth degree. Respondent's contention was rejected that the court did not have subject matter jurisdiction because the parties were no longer in an intimate relationship. Both parties testified that they started dating before they moved to New York in February 2012, and that they remained a couple until September 2012. Additionally, although their sexual relationship ended in the fall of 2012, the parties continued to live together on-and-off until the petition was filed in March 2013. Thus, the court properly determined that the parties' relationship fitted within the plain terms of the statute. The evidence was legally sufficient to support a finding that respondent committed the family offense of disorderly conduct, thus warranting the issuance of an order of protection. Petitioner testified that respondent screamed at her in a harassing and obscene manner in her place of business on December 20, 2012, in the presence of customers and employees. Moreover, respondent admitted that he screamed at petitioner at her place of business in the presence of customers. However, the evidence was legally insufficient to establish that respondent committed the family offense of stalking in the fourth degree. Therefore, the finding was vacated in the underlying fact-finding order that respondent committed the family offense of stalking in the fourth degree.

Matter of Tucker v Miller, 138 AD3d 1383 (4th Dept 2016)

Court Erred in Disposing of Matter on Basis of Respondent's Purported Default; Brief Colloquy Between Court and Petitioner Insufficient to Establish Respondent's Commission of Family Offense

Family Court issued an order of protection requiring respondent to refrain from offensive conduct toward petitioner, and granting petitioner temporary custody of the parties' three children, subject to defined visitation by respondent. The Appellate Division reversed and dismissed the family offense petition. The court erred in disposing of the matter on the basis of respondent's purported default. A respondent who failed to appear personally in a matter but nonetheless was represented by

counsel who was present when the case was called, was not in default in that matter. Moreover, petitioner failed to establish by a fair preponderance of the evidence that respondent committed the family offense of harassment in the second degree. In this non-default posture, the brief colloquy between the court and petitioner, who merely "re-verified" the allegations of the petition, was insufficient to establish respondent's commission of the family offense. The hearing record contained no evidence concerning the content of the telephone calls made and the texts sent by respondent in the context of the parties' custody/ visitation dispute, and thus there was no evidentiary basis for a finding that respondent engaged in a course of conduct that was intended to alarm or seriously annoy petitioner and lacked any legitimate purpose. Nor was evidence presented at the hearing sufficient to support a finding that respondent attempted or threatened to strike, shove or kick petitioner or otherwise subject her to physical contact.

Matter of Daniels v Davis, 140 AD3d 1688 (4th Dept 2016)

Order of Protection Affirmed; Family Offense of Disorderly Conduct Did Not Have to Take Place in Public, Provided Respondent Recklessly Created Risk of Public Disturbance

Family Court issued an order of protection upon a determination that respondent committed acts constituting various family offenses, including reckless endangerment in the second degree. The Appellate Division affirmed. Although the court found that respondent committed various family offenses and sufficiently stated the facts it deemed essential to its decision, it did not specify the subsections of the criminal statutes upon which it based its findings that respondent committed the family offenses of forcible touching, harassment in the second degree, and disorderly conduct. The Appellate Division exercised its independent review power. The proof was sufficient to establish, by a preponderance of the evidence, that respondent committed the family offenses of forcible touching under Penal Law Section 130.52 (1), disorderly conduct under section 240.20 (1), and harassment in the second degree under section 240.26 (1). Respondent's contention was rejected that the evidence did not support the finding that he committed the family offense of disorderly conduct because he did not intend to create a public disturbance. The conduct did not have to take place in public, so long as the person recklessly created a risk of a public disturbance. The testimony at the fact-finding hearing established that respondent, in the parties' home, threw petitioner against a wall, forced his fingers in her mouth and caused bleeding, slapped her face, punched her legs, forcibly touched her vagina, and grabbed her by the hair when she tried to get away, all of which ultimately resulted in petitioner leaving the home with her three children, thereby sufficiently establishing a risk of public disturbance. The testimony also supported, by a preponderance of the evidence, the court's conclusion that respondent committed the family offenses of reckless endangerment in the second degree, forcible touching, and harassment in the second degree.

Matter of Telles v Dewind, 140 AD3d 1701 (4th Dept 2016)

JURISDICTION

Court Had Subject Matter Jurisdiction to Conduct Permanency Hearing After Neglect Petition Dismissed

Family Court, after dismissing DSS's petition alleging that respondent mother neglected the subject child, conducted a permanency hearing and continued placement of the child with petitioner. The Appellate Division affirmed. On November 10, 2014, the court directed the temporary removal of respondent's one-week-old child from her care pursuant to Family Court Act § 1022. Petitioner commenced an article 10 proceeding against the mother, alleging that the child was at imminent risk of harm because of the mother's alleged inability to provide proper care due to a lack of housing and her inability to care for her own medical needs. After a permanency hearing in June 2015, the court continued placement until the next permanency hearing and directed that the mother continue under the supervision of petitioner. The fact finding hearing on the neglect petition was held in December 2015. The court denied petitioner's application to amend the petition and to conform the pleadings to the proof and determined that any offer of proof beyond November 10, 2014, would not be relevant in the fact-finding, but could be relevant at the permanency planning hearing and/or dispositional hearing. Thereafter, the court dismissed the petition on the ground, among other things, that the one week the child was in the mother's care, petitioner failed to prove that the child's physical, mental or emotional condition was impaired or in danger of being impaired. The mother then sought an order dismissing the permanency petition and vacating the temporary order placing the child with petitioner. The application was opposed by petitioner, the AFC, and the child's father, on the ground that the court had jurisdiction to conduct the permanency hearing pursuant to Family Court Act §1088. The court denied the application and, at the next permanency hearing, the mother consented to continuing placement of the child with petitioner, but reserved her right to challenge the court's exercise of subject matter jurisdiction to conduct a permanency hearing after the neglect petition had been dismissed. The court retained jurisdiction to conduct the permanency hearing despite dismissal of the neglect petition. Under the plain language of the provisions of article 10, the court obtained jurisdiction as a result of the child's placement pursuant to section 1022, and it was required to make a determination whether to return the child to the parent based upon the best interests and safety of the child. The mother's contention that her substantive due process rights were violated by continuing placement of the child in the absence of a finding of neglect was not properly before the Appellate Division because the order was entered on consent. Moreover, the evidence at the hearing showing that the child would be at risk of abuse or neglect if returned to the mother constituted "overriding necessity," and thus the mother's due process rights were not violated. The dissent would have held that the court lacked subject matter jurisdiction.

Matter of Jamie J., 145 AD3d 127 (4th Dept 2016)

JUVENILE DELINQUENCY

Respondent's Admission to Underlying Act Not Defective

Family Court adjudicated respondent a juvenile delinquent. The Appellate Division affirmed. In appeal No. 1, respondent appealed from an order of disposition that placed her in the custody of the Office of Children and Family Services for a period of one year. In appeal No. 2, respondent appealed from an order adjudicating her a juvenile delinquent based upon a finding that she committed an act that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree (Penal Law Section 145.00 [1]). Inasmuch as the appeal from the order of disposition brought up for review the underlying fact-finding order adjudicating her a juvenile delinquent, the appeal from the fact-finding order in appeal No. 2 was dismissed. Respondent's contention in appeal No. 1 was rejected that her admission to the underlying act was defective because Family Court failed to comply with Family Court Act Section 321.3 (1). Respondent was not required to preserve her contention for review inasmuch as the requirements of Family Court Action Section 321.3 were mandatory and nonwaivable. The record established that, in its allocution with respondent and her mother, the court properly advised them of respondent's right to a fact-finding hearing, and the court ascertained that respondent committed the act to which she was entering the admission, that she was voluntarily waiving her right to a fact-finding hearing, that her mother did not object to the admission and waiver, and that they were aware of the possible specific dispositional orders.

Matter of Celina D., 145 AD3d 1634 (4th Dept 2016)

ORDER OF PROTECTION

Court Erred in Imposing Restrictions on Respondent's Ability to Use or Possess Firearms During Pendency of Order of Protection

Family Court issued a two-year order of protection upon its determination that respondent willfully violated a prior order of protection issued in favor of petitioner. The Appellate Division modified by vacating the provision directing that respondent was not to use or possess firearms nor hold or apply for a pistol permit during the pendency of the order. The evidence supported the court's determination that respondent willfully violated the prior order of protection, which directed respondent not to communicate with petitioner except by text message regarding the health, safety and welfare of their children. It was undisputed that respondent contacted petitioner via text message regarding matters unrelated to their children during the pendency of the order of protection. However, the court erred in imposing restrictions on respondent's ability to use or possess firearms during the pendency of the order. Under Family Court Act Section 846-a, the court could revoke a license to carry and possess a firearm if the court determined that the willful failure to obey a protective order involved violent behavior constituting the crimes of menacing, reckless endangerment, assault or attempted assault. Here, no such determination was made. Moreover, restriction of respondent's right to use or possess firearms was not warranted under Family Court Act Section 842-a, inasmuch as the court did not find, and could not find based on the evidence at the hearing, that the conduct which resulted in the issuance of the order of protection involved (I) the infliction of physical injury..., (ii) the use or threatened use of a deadly weapon or dangerous instrument..., or (iii) behavior constituting any violent felony offense, or that there was a substantial risk that the respondent may use or threaten to use a firearm unlawfully against the person or persons for whose protection to order of protection was issued.

Schoenl v Schoenl, 136 AD3d 1361 (4th Dept 2016)

Court Erred in Issuing Order of Protection Without Adhering to Procedural Requirements of Family Court Act Section 154-c (3)

In appeal No. 1, Family Court issued a two-year order of protection against respondent mother. The Appellate Division reversed and dismissed the petition. Although the mother's challenges to the order were not preserved for appellate review, the Court exercised its power to review those challenges as a matter of discretion in the interest of justice. The court erred in issuing an order of protection without adhering to the procedural requirements of Family Court Act Section 154-c (3). The court did not make a finding of fact that petitioner father was entitled to an order of protection based upon a judicial finding of fact, judicial acceptance of an admission by the mother or judicial finding that the mother had given knowing, intelligent and voluntary consent to its issuance. The evidence was insufficient to establish any of the family offenses alleged in the petition, and thus the petition should have been dismissed on that ground. In appeal No. 2, the court granted the father's amended petition to modify the custody and

visitation provisions of the divorce judgment and subsequent order of custody and visitation. There was a sound and substantial basis in the record for the court's determination that there had been a change in circumstances which reflected a real need for change to ensure the best interests of the children. Evidence of the mother's efforts to alienate the children from the father and her unstable and erratic behavior supported the award of physical custody to the father.

Matter of Hill v Trojnor, 137 AD3d 1671 (4th Dept 2016)

PATERNITY

Reversal of Order Vacating Acknowledgment of Paternity

Family Court vacated the acknowledgment of paternity signed by Gerald S. and Jennifer L., among other things. The Appellate Division reversed, reinstated the acknowledgment of paternity, custody order, and petition for modification of custody, among other things, and remitted. Petitioner in the first proceeding was the biological mother of a child born in October 2012. A week after the child's birth, the mother and respondent in the first proceeding, Gerald S., signed an acknowledgment of paternity. The mother was unable to care for the child because of her own mental health issues, and custody was granted to Gerald. Approximately one year later, Family Court issued a consent order granting the mother and Gerald joint custody with Gerald having primary physical residency. Less than two months later, in December 2013, the mother filed the petition in the first proceeding to vacate the acknowledgment of paternity. Gerald then filed the petition in the second proceeding to modify custody by seeking sole custody of the child. In the third proceeding, the child's maternal grandmother filed a petition seeking custody of the child. In the fourth proceeding, in March 2014, the mother filed a paternity petition against Shane C. The mother and Shane appeared before the court on the paternity petition, and Shane, who had no involvement in the child's life to that point, expressed in no uncertain terms that he wanted nothing to do with the child. Nevertheless, the court, without notification to Gerald, ordered a genetic marker test, which indicated a 99.99% probability that Shane was the child's father. At the conclusion of the hearing on the mother's petition to vacate the acknowledgment of paternity, the court, among other things, granted the mother's petition, dismissed Gerald's modification petition with prejudice, vacated the custody order, implicitly granted the mother's paternity petition with respect to Shane by declaring Shane the father of the child, and removed Gerald as a party in the grandmother's proceeding. The court should have considered paternity by estoppel before it decided whether to test for biological paternity. That did not occur because Gerald was not a named party in the paternity proceeding and did not otherwise appear when the court ordered Shane to submit to a genetic marker test. Gerald did not have the opportunity to raise the doctrine of estoppel. The court should have joined Gerald in that proceeding or otherwise notified him before it ordered the test. Gerald was not only the acknowledged father of the child, but was the custodial parent of the child, and the court was well aware of those facts inasmuch as it had issued the custody orders. However, the court made it clear in its decision that even if Gerald had made a timely objection and raised the defense earlier, the court nevertheless would have ordered the test because the child was young and "the truth (was) important." That was contrary to both the plain language of the statute and statements of law by the Court of Appeals. Even though the genetic marker test had already been conducted, the court was still authorized to consider the estoppel issue. Although the court held a hearing, its decision showed that it had little regard for the doctrine estoppel. Gerald was denied a fair hearing on the issue of equitable estoppel. Owing to the passage of time since the entry of the order on appeal, which directed Gerald to immediately turn the child over to the mother,

pending a new determination, the maternal grandmother was to retain physical custody of the child.

Matter of Jennifer L. v Gerald S., 145 AD3d 1581 (4th Dept 2016)

TERMINATION OF PARENTAL RIGHTS

Court Did Not Abuse Its Discretion in Denying Respondent's Recusal Request

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The father's contention was rejected that the court abused its discretion in denying his recusal request. The father's request was based on his allegation that the court presided over the prosecution of the father for the sexual abuse of his daughter that formed the basis for the instant proceeding, and on the father's contention that the court obtained information in violation of the father's attorney-client privilege. The father's brief did not address the alleged violation of his attorney-client privilege, and thus he abandoned that contention. Where there was no allegation that recusal is statutorily required, the matter of recusal was addressed to the discretion and personal conscience of the Judge whose recusal is sought. The fact that the same jurist presided over the proceeding in Family Court as well as the criminal prosecution was not a statutory basis for recusal, and there was no abuse of discretion.

Matter of Christopher D.S., 136 AD3d 1285 (4th Dept 2016)

Where Father Agreed that Court Could Take Judicial Notice of Past TPR Proceedings, it Was Again Concluded That Petitioner Met Its Burden

Family Court terminated the parental rights of respondent father. The Appellate Division affirmed for the reasons stated at Family Court, and added that the testimony at the hearing established that nothing concerning the father's mental health had changed since the affirmance of an order terminating his parental rights with respect to another child on the ground of mental illness. Inasmuch as the father agreed that the court could take judicial notice of those past proceedings, it was again concluded that petitioner met its burden of demonstrating by clear and convincing evidence that the father was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child.

Matter of Brayden R., 136 AD3d 1320 (4th Dept 2016)

Affirmance of Termination of Parental Rights on Ground of Permanent Neglect

Family Court terminated the parental rights of respondent mother on the ground of permanent neglect. The Appellate Division affirmed. Although the mother participated and progressed in some of the services offered by petitioner, petitioner established that the mother did not complete any of those services and failed to address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return. The mother failed to preserve her contention that the court abused its discretion in not imposing a suspended judgment. In any event, a suspended judgment was not warranted inasmuch as any progress made by the mother in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child's unsettled familial status.

Matter of London J., 138 AD3d 1457 (4th Dept 2016)

Respondent Not Denied Effective Assistance of Counsel

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. The mother's contention was rejected that she was denied effective assistance of counsel inasmuch as she did not demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings. Ineffectiveness was not to be inferred merely because the attorney counseled the mother to admit the allegations in the petition.

Matter of Joey J., 140 AD3d 1687 (4th Dept 2016)

Mother's Contention Unpreserved for Review That Court Should Have Awarded Custody to Maternal Grandmother

Family Court terminated respondent mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The record supported the court's determination that the mother made only minimal progress in addressing the issues that resulted in the children's removal from her custody, which was not sufficient to warrant any further prolongation of the children's unsettled familial status. Consequently, a suspended judgment would not serve the best interests of the children. The mother failed to preserve for review her further contention that the court should have awarded custody of the subject children to the maternal grandmother, because the mother did not seek that result at the dispositional hearing.

Matter of Alexus R.L., 140 AD3d 1699 (4th Dept 2016)

Affirmance of Termination of Parental Rights on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the children, taking into consideration the particular problems facing the father and tailoring its efforts to assist him in overcoming those problems. Petitioner, among other things, scheduled regular visitation and referred the father to services designed to address his needs regarding his mental health, anger management, alleged substance abuse, and parenting skills. The father's contention was rejected that petitioner could not engage in diligent efforts to reunite him with his children while simultaneously planning for the children's potential adoption. Although the father took advantage of some of the services offered by the petitioner, petitioner demonstrated that, among other things, the father inconsistently applied the knowledge and benefits he obtained from the services provided, continued to act inappropriately in the children's presence, and on occasion failed to cooperate with representatives of petitioner despite a prior order directing that he did so. Therefore, petitioner demonstrated by clear and convincing evidence that the father failed to address

successfully the problems that led to the removal of the children and continued to prevent the children's safe return.

Matter of Joshua T.N., 140 AD3d 1763 (4th Dept 2016)

Termination of Mother's Parental Rights on Ground of Abandonment Affirmed

Family Court terminated respondent mother's parental rights on the ground of abandonment. The Appellate Division affirmed. The mother's contention was rejected that she had sufficient significant, meaningful communications with petitioner to demonstrate that she did not abandon the subject children. A child was deemed abandoned where, for the period six months immediately prior to the filing of the petition for abandonment, a parent evinced an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or petitioner, although able to do so and not prevented or discouraged from doing so by petitioner. The mother conceded that she had no contact with the subject children during the relevant six-month period despite opportunities for visitation. Contrary to the mother's contention, her minimal, sporadic and insubstantial contacts with petitioner during that six-month period were insufficient to preclude a finding of abandonment.

Matter of Azaleayanna S.G.-B., 141 AD3d 1105 (4th Dept 2016)

Mother Failed to Engage Meaningfully in Treatment Necessary to Address Her Parental Failings

Family Court terminated respondent mother's parental rights to the subject child on the ground of permanent neglect and freed the child for adoption. The Appellate Division affirmed. There was clear and convincing evidence that petitioner made diligent efforts to encourage and strengthen the relationship between mother and child. The evidence established that petitioner, among other things, facilitated visitation between the mother and child, arranged for parenting classes and monitored the mother's progress, conducted service plan reviews, and referred the mother to mental health services. Despite those efforts, the mother failed to plan substantially for the child's future. Although she participated in some of the services offered by petitioner, she failed to comply with the requirement that she consistently attend mental health counseling and thus the court properly concluded that the mother refused to engage meaningfully in treatment necessary to address her failure to place the child's needs before her own.

Matter of Kendalle K., 144 AD3d 1670 (4th Dept 2016)

Court Erred in Denying Respondent's Recusal Request

Family Court terminated respondent father's parental rights. The Appellate Division vacated the disposition, granted respondent's motion for recusal, and remitted for a new dispositional hearing. At the conclusion of the fact-finding hearing, the court made

a finding of permanent neglect and scheduled a dispositional hearing. The day after the finding, the father made a death threat against the court, the AFC, the caseworker and the police. The father was thereafter charged with making a terroristic threat and an order of protection was issued against the father in favor of the court. Under these circumstances, and particularly in view of the order of protection, the court abused its discretion in denying the father's recusal motion and in presiding over the dispositional hearing.

Matter of Trinity E., 144 AD3d 1680 (4th Dept 2016)

No Error in Court's Denial of Respondent's Request For Adjournment

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The court did not err in denying the father's request to adjourn the hearing so he could contact unnamed witnesses inasmuch as he failed to demonstrate that the need for the adjournment to subpoena the witnesses was not based upon a lack of due diligence on the part of him or his attorney. The court did not abuse its discretion in denying the father's repeated requests to adjourn the hearing to allow him to retain counsel or to allow his allegedly retained counsel to appear. When the father initially sought an adjournment in the midst of the hearing to retain new counsel, the court indicated that the father could hire an attorney but that counsel must appear at the next adjourned date. Although on the next court dated the father indicated that he had retained counsel, counsel did not appear at the hearing or contact the court. The court then denied the father's request for another adjournment. Under the circumstances here, including the six-year period during which the permanent neglect proceeding was pending and the children's status remained unsettled, and in light of the father's repeated groundless requests for adjournments, the court did not err in determining that the father's request was merely another delaying tactic.

Matter of Latonia W., 144 AD3d 1692 (4th Dept 2016)